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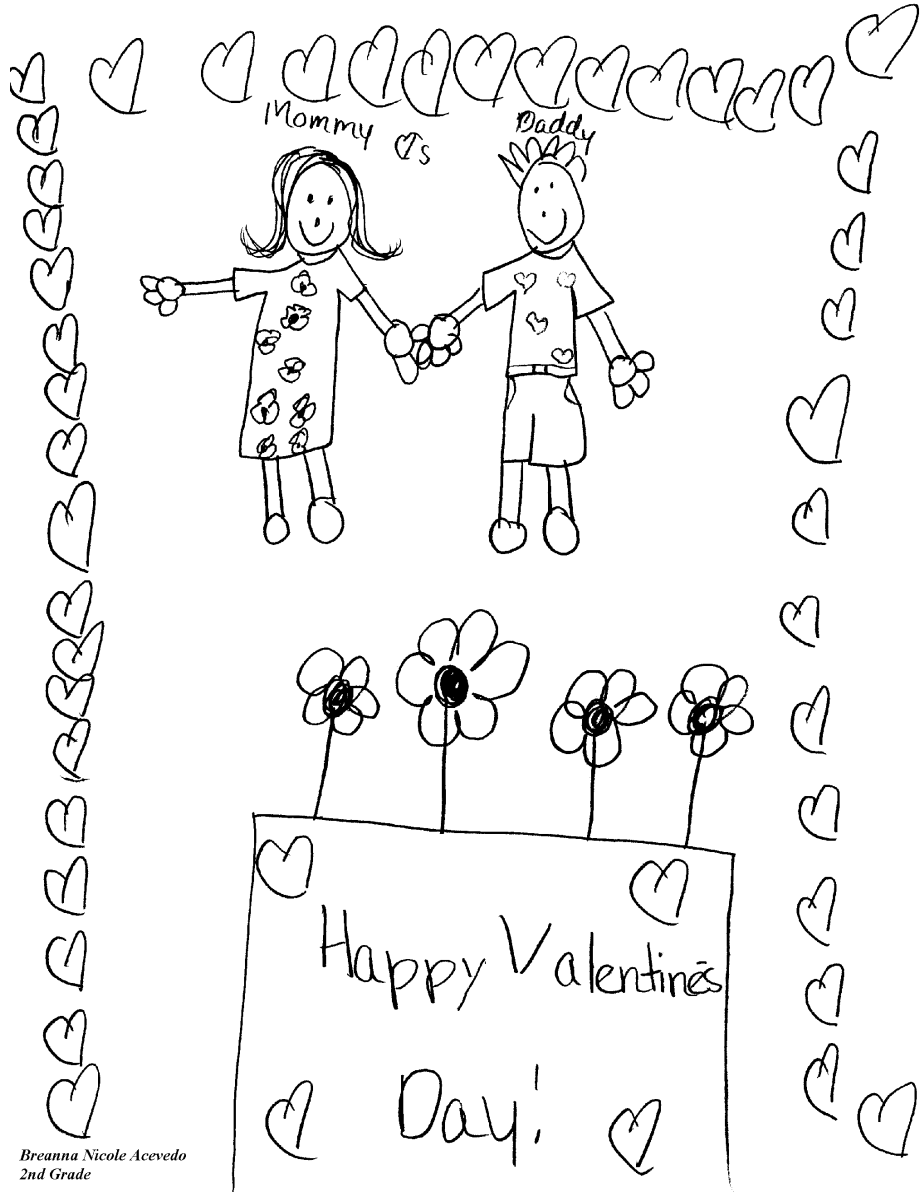

Breanna Nicole Acevedo
2nd Grade

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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(800) 226-7199
(512) 463-5561
FAX (512) 463-5569
http://www.sos.state.tx.us
subadmin@sos.state.tx.us

Publisher –
Secretary of State
Director - Dan Procter

Staff
Ada Aulet
Leti Benavides
Dana Blanton
Carla Carter
Kris Hogan
Roberta Knight
Jill S. Ledbetter
Juanita Ledesma
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IN THIS ISSUE

Open Meetings

A notice of a meeting filed with the Secretary of State by a state governmental body or the governing body of a water district or other district or political subdivision that extends into four or more counties is posted at the main office of the Secretary of State in the lobby of the James Earl Rudder Building, 1019 Brazos, Austin, Texas.

Notices are published in the electronic *Texas Register* and available on-line.
http://www.sos.state.tx.us/texreg

To request a copy of a meeting notice by telephone, please call 463-5561 if calling in Austin. For out-of-town callers our toll-free number is (800) 226-7199. Or fax your request to (512) 463-5569.

Information about the Texas open meetings law is available from the Office of the Attorney General. The web site is http://www.oag.state.tx.us. Or phone the Attorney General's Open Government hotline, (512) 478-OPEN (478-6736).

For on-line links to information about the Texas Legislature, county governments, city governments, and other government information not available here, please refer to this on-line site. http://www.state.tx.us/Government

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE ATTORNEY GENERAL

Under provisions set out in the Texas Constitution, the Texas Government Code, Title 4, §402.042, and numerous statutes, the attorney general is authorized to write advisory opinions for state and local officials. These advisory opinions are requested by agencies or officials when they are confronted with unique or unusually difficult legal questions. The attorney general also determines, under authority of the Texas Open Records Act, whether information requested for release from governmental agencies may be held from public disclosure. Requests for opinions, opinions, and open records decisions are summarized for publication in the *Texas Register*. The attorney general responds to many requests for opinions and open records decisions with letter opinions. A letter opinion has the same force and effect as a formal Attorney General Opinion, and represents the opinion of the attorney general unless and until it is modified or overruled by a subsequent letter opinion, a formal Attorney General Opinion, or a decision of a court of record. You may view copies of opinions at http://www.oag.state.tx.us. To request copies of opinions, please fax your request to (512) 462-0548 or call (512) 936-1730. To inquire about pending requests for opinions, phone (512) 463-2110.

Request for Opinions

RQ-0309-GA

Requestor:

The Honorable Leticia Van de Putte, R.Ph.

Chair, Veteran Affairs and Military Installations Committee

Texas State Senate

Post Office Box 12068

Austin, Texas 78711

Re: Meaning of "citizens of Texas" in section 54.203(a) of the Education Code (Request No. 0309-GA)

Briefs requested by February 28, 2005

RQ-0310-GA

Requestor:

The Honorable Frank Madla

Chair, Intergovernmental Relations Committee

Texas State Senate

Post Office Box 12068

Austin, Texas 78711

Re: Whether the Live Oak Treaty of 1838 is still a binding agreement (Request No. 0310-GA)

Briefs requested by February 28, 2005

RQ-0311-GA

Requestor:

Ms. L. Marliessa Clark, C.P.A.

Hamilton County Auditor

Hamilton County Courthouse

Hamilton, Texas 76531

Re: Procedures applicable to county's accounting for and spending excess contributions returned to county pursuant to Government Code section 26.008 (Request No. 0311-GA)

Briefs requested by February 28, 2005

RQ-0312-GA

Requestor:

The Honorable Michael S. Wenk

Hays County Criminal District Attorney

Hays County Justice Center

110 East Martin Luther King

San Marcos, Texas 78666

Re: Whether a home rule city may change the city's date for general elections through an amendment to the city charter (Request No. 0312-GA)

Briefs requested by March 2, 2005

For further information, please access the website at www.oag.state.tx.us. or call the Opinion Committee at (512) 463-2110.

TRD-200500459
Nancy S. Fuller
Assistant Attorney General
Office of the Attorney General
Filed: February 1, 2005

♦ ♦ ♦

PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 22. EXAMINING BOARDS

PART 11. BOARD OF NURSE EXAMINERS

CHAPTER 216. CONTINUING EDUCATION

22 TAC §§216.1 - 216.3, 216.5

The Board of Nurse Examiners (Board) proposes amendments to 22 Texas Administrative Code §§216.1 - 216.3 and §216.5, concerning Continuing Education. Effective February 1, 2004, the Board of Nurse Examiners and the Board of Vocational Nurse Examiners were merged into one agency, the Board of Nurse Examiners. The Board of Vocational Nurse Examiners ceased to exist as an agency. House Bill 1483, passed by the 78th Regular Legislative Session, was the legislative action that implemented the consolidation. These amendments implement House Bill 1483 and the make-up and function of the new Board of Nurse Examiners. Concurrent with these proposed amendments is the proposed repeal of Chapter 237 which addressed continuing education for licensed vocational nurses only. Chapter 216 will subsequently be applicable to all nurses. These amendments are for the purpose of preventing conflicting rules and consolidating the rules applicable to all nurses under Part 11 (Board of Nurse Examiners) of the Texas Administrative Code.

The Board gave a charge to the Nursing Practice Advisory Committee (NPAC) at the October 2004 Board meeting, to review the existing Chapter 237, Vocational Nursing Continuing Education (CE), and Chapter 216, RN Continuing Education (CE), for the purpose of combining the rules. As a result of NPAC's recommendation, the Board is proposing the repeal of the existing Chapter 237 (Vocational Nursing Continuing Education) and the adoption of amendments to §§216.1 - 216.3 and §216.5 (Continuing Education) to bring all nurses under Texas Occupations Code §301.303. This will consolidate the CE rules into one chapter and will complete the consolidation of all the rules under one board.

The existing CE rules for Registered Nurses (RNs) (Chapter 216) and Licensed Vocational Nurses (LVNs) (Chapter 237) are very similar. Twenty hours of continuing education will still be required over a two year period and authorization will continue for LVN associations through the existing Board that were previously authorized in §237.1(4) and §237.15 by the Board of Vocational Nurse Examiners to offer Type I CE.

Some differences, however, exist between the rules. These include: 1) Under Chapter 237, LVNs were required to take Type I CEs for all 20 hours. Under §301.303 of the Nursing Practice Act and Chapter 216, however, at least 10 hours of CEs must be Type 1 CE, but the remaining 10 hours can be Type II; 2) Chapter 237 has specific allowances for exemptions to the CE requirements which Chapter 216 does not explicitly provide. The practice of the Board, however, has been to allow exemptions on a case-by-case basis, without specific exemptions being delineated in the rule itself; 3) Chapter 237 allows LVNs to count CPR as one CEU. Section 216.6 specifically prohibits CPR from qualifying as a CE, because CPR is viewed as basic education preparation for all nurses. Due to the additional flexibility of allowing Type II CE, this is not anticipated to be an issue. Having equivalent requirements for both RNs and LVNs is seen as being a priority.

Chapter 216's terminology is generic in referring to "license holders" or "licensees," and only refers to Registered Nurses specifically in the Hepatitis C continuing education requirement. (LVNs were not required to have this CE course.) RNs and LVNs are specifically referred to in the Bioterrorism CE requirement of this rule, because the statute imposing this requisite CE placed the burden on the BNE to implement a Bioterrorism rule for all nurses. (The Board is leaving in §216.3(4) addressing the Hepatitis C requirement even though the time frame for compliance has expired. RNs will still be required to show proof of CE from that time frame when audited, and may want to know the origin of the requirement.)

During the NPAC review of the proposed rules, a question was posed concerning the potential for the LVN associations to offer CE to RNs. To ensure that any CE offered meets the definition of the rule "programs beyond the basic preparation which are designed to promote and enrich knowledge...," the Board determined that the rules needed clarification.

To promote clarification of the rules, revisions were made. In §216.1, the definition of advanced practice nurse (APN) was changed to be consistent with the definition in Chapter 221. In §216.2, the statute citation was updated from the Revised Civil Statutes to the Occupations Code. Section 216.3(1) includes an additional sentence to clarify that RNs must be a part of the CE planning committee for target audiences that include RNs and for target audiences that include both RNs and LVNs. Target audiences that are composed of LVNs only would not need a RN on the planning committee. Section 216.3(3)(A) was changed to include paragraph (5) addressing bioterrorism CE requirement for APNs, and language was added to §216.5(3) to clarify that the requirements are for one renewal period only. Section 216.5(4) was reorganized.

Katherine Thomas, Executive Director, has determined that for the first five-year period the proposed amendments are in effect there will be no fiscal implications for state or local government as a result of implementation.

Ms. Thomas has also determined that for each year of the first five years the proposed amendments are in effect, the

public benefit will be that the proposed amendments will provide a unified set of continuing education requirements for LVNs and RNs, more flexibility for LVNs by allowing Type II CE, and consistency in applying the CE rules to all licensed nurses. The proposed amendments will also prevent conflicting rules. There is no known effect on small businesses and no anticipated cost to affected individuals as a result of the proposed amendments.

Written comments on the proposal may be submitted to Katherine A. Thomas, MN, RN, Executive Director, Board of Nurse Examiners, 333 Guadalupe, Suite 3-460, Austin, Texas 78701.

The amendments are proposed pursuant to the authority of Texas Occupations Code §301.151 and §301.152 which authorizes the Board of Nurse Examiners to adopt, enforce, and repeal rules consistent with its legislative authority under the Nursing Practice Act.

The adoption of the proposed amendments will implement Texas Occupations Code §§301.303 - 301.305.

§216.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) (No change.)

(2) Advanced Practice Nurse (APN)--A registered nurse approved by the board to practice as an advanced practice nurse based on completion of an advanced educational program acceptable to the board. The term includes a nurse practitioner, nurse-midwife, nurse anesthetist, and a clinical nurse specialist. [~~A professional nurse, currently licensed in the State of Texas, who is prepared for advanced nursing practice by virtue of knowledge and skills obtained in an advanced educational program of study acceptable to the board and meets requirements of Rule 221 and/or Rule 222.~~]

(3) - (21) (No change.)

§216.2. Purpose.

Continuing education in nursing includes programs beyond the basic preparation which are designed to promote and enrich knowledge, improve skills and develop attitudes for the enhancement of nursing practice, thus improving health care to the public. Pursuant to authority set forth in Texas Occupations Code §301.303, [~~Civil Statutes, Article 4518, §7,~~] the board is establishing rules requiring participation in continuing education activities for license renewal. The procedures set forth in these rules provide a variety of means for licensees to comply with this requirement. The board assumes licensed nurses will maintain the high standards of the profession in selecting quality educational programs to fulfill the continuing education requirement. The board also assumes that providers will plan and implement quality educational programs which meet the criteria of the board.

§216.3. Requirements.

Twenty contact hours of continuing education within the two years immediately preceding renewal of registration are required.

(1) Type I. Ten contact hours shall be obtained by participation in programs approved by a credentialing agency recognized by the board. The program shall meet all criteria listed in §216.4 of this title (relating to Criteria for Acceptable Continuing Education Activity). In addition, there shall be a nurse on the planning committee and target audience shall include nurses. For RN or LVN/RN target groups, a RN shall be on the planning committee to ensure that program objectives and content are commensurate with recognized standards for RN continuing education courses. The board recognizes agencies/organizations to approve providers and/or programs for Type I credit. A list of these agencies/organizations may be obtained from the board's office.

(2) (No change.)

(3) Requirements for the Advanced Practice Nurse. The licensee authorized by the Board as an advanced practice nurse (APN) is required to obtain 20 contact hours of continuing education within the previous two years of licensure.

(A) The required hours are not in addition to the requirements of paragraphs (1), (2), [~~and~~] (4), and (5) of this section.

(B) - (D) (No change.)

(4) - (5) (No change.)

§216.5. Additional Criteria for Specific Continuing Education Programs.

In addition to those listed in §216.4 of this title (relating to Criteria for Acceptable Continuing Education Activity), the following guidelines shall apply to the selection and/or planning and implementation of specific CE programs:

(1) - (2) (No change.)

(3) Self-directed study.

(A) Program development and presentation.

(i) - (iii) (No change.)

(iv) Two hours of Type II credit per program topic up to five hours per renewal period may be obtained through this means.

(B) - (C) (No change.)

(D) Authorship.

(i) - (iii) (No change.)

(iv) Five contact hours of Type II credit may be obtained through this means per renewal period.

(4) Out-of-state programs.

[~~(A)~~] A continuing education program attended or undertaken in a jurisdiction outside of Texas may be accepted:

(A) [~~(i)~~] for Type I credit if all criteria are met and if it is approved by one of the board's recognized credentialing agencies/organizations; and

(B) [~~(ii)~~] for Type II credit if it meets the criteria listed in §216.4 of this title and §216.5 of this section concerning criteria for acceptable continuing education activity and additional criteria for specific continuing education programs.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 24, 2005.

TRD-200500331
Katherine Thomas
Executive Director
Board of Nurse Examiners
Earliest possible date of adoption: March 13, 2005
For further information, please call: (512) 305-6823

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CHAPTER 217. LICENSURE, PEER ASSISTANCE AND PRACTICE

22 TAC §217.1, §217.4

The Board of Nurse Examiners (Board) proposes amendments to 22 Texas Administrative Code §217.1 and §217.4, concerning Licensure, Peer Assistance and Practice. Section 217.1 specifically addresses "Definitions" and §217.4 is entitled "Requirements for Initial Licensure by Examination for Nurses Who Graduate from Nursing Education Programs Outside of United States' Jurisdiction." The proposed amendment to §217.1 will include the definition of "credentialing evaluation services (CES)" in and delete the definition of the Commission on Graduates of Foreign Nursing Schools (CGFNS). Section 217.4 will broaden the acceptable verification organizations and availability of organizations that can provide credential evaluation services (CES) of foreign-educated nurses. As a result, the time period in obtaining the necessary information requested from the credentialing organizations would be shorter time periods and provide equal and some enhanced services. By requiring credentials from these organization, the CGFNS certification program requirement would become unnecessary and, therefore, eliminated.

The State of Florida issued a Request for Proposal (RFP) for organizations to provide credentialing services for foreign-educated nurses wanting to be licensed in Florida. In response to the RFP, two organizations submitted their proposals to the Florida board and assured that they could render the necessary services within an equal or shorter time period. The BNE Staff reviewed the credential evaluation service requirements of the Florida RFP and determined that its minimum requirements met our credentialing needs for foreign graduates. The Texas Board has historically used only the Commission on Graduates of Foreign Nursing Schools (CGFNS), but the waiting period for the credentialing services has taken longer over time. In order to provide equal service and quicker time periods for processing, the Staff requests that this Board approve the addition of these two organizations (the two organizations that responded to the Florida RFP) for the provision of credentialing service for nurses educated outside U.S. jurisdictions--Educational Records Evaluation Service (ERES) and the International Education Research Foundation (IERF). For foreign candidates needing H1 visa credentialing, only CGFNS is recognized to provide this service which means some candidates might have to have two sets of credentials completed if they do not initially utilize CGFNS.

Katherine Thomas, executive director, has determined that for the first five-year period the proposed amendments are in effect there will be no fiscal implications for state or local government as a result of implementation.

Katherine Thomas, executive director, has determined that for each year of the first five years the proposed amendments are in effect the public benefit will allow foreign nursing graduates to have equal service, quicker processing of credentials, and will eliminate the certification program requirement. There is no known effect on small businesses and the anticipated cost to affected individuals as a result of this proposed amendment would be for foreign candidates needing H1 visa credentialing if they do not use CGFNS originally, because only CGFNS is recognized to provide this service which means some candidates might have to have two sets of credentials completed.

Written comments on the proposal may be submitted to Katherine A. Thomas, MN, RN, Executive Director, Board of Nurse Examiners, 333 Guadalupe, Suite 3-460, Austin, Texas 78701.

The amendments are proposed pursuant to the authority of Texas Occupations Code §301.151 and §301.152 which authorizes the Board of Nurse Examiners to adopt, enforce, and repeal rules consistent with its legislative authority under the Nursing Practice Act.

The proposed amendments will not affect any existing statute.

§217.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) - (6) (No change.)

(7) Credential Evaluation Services (CES) [~~Commission on Graduates of Foreign Nursing Schools (CGFNS) Certificate~~]--Documentation that verifies the educational credentials and licensure [~~and/or CGFNS examination results~~] of graduates of foreign nursing schools.

(8) - (50) (No change.)

§217.4. Requirements for Initial Licensure by Examination for Nurses Who Graduate from Nursing Education Programs Outside of United States' Jurisdiction.

(a) Nurse applicants for initial licensure applying under this section.

(1) A licensed vocational nurse applicant must:

(A) (No change.)

(B) have successfully completed an approved program for educating vocational/practical (second level general nurses) nurses or curriculum content comparable to the Texas curriculum requirements for graduates of approved vocational nursing education programs by providing a Credential Evaluation Service Full Education Course-by-Course Report from the Commission on Graduates of Foreign Nursing Schools (CGFNS), Educational Records Evaluation Service (ERES), or the International Education Research Foundation (IERF); [~~as evidenced by a transcript in English or one translated by an official translation service;~~] and

(C) have achieved an approved score on an English proficiency test acceptable to the Board [~~passed an examination of English proficiency with a board-approved score~~].

(2) A registered nurse applicant must provide a [~~Commission on Graduates of Foreign Nursing Schools (CGFNS) certificate, or a CGFNS~~] Credential Evaluation Service Full Education Course-by-Course Report from the Commission on Graduates of Foreign Nursing Schools (CGFNS), Educational Records Evaluation Service (ERES), or the International Education Research Foundation (IERF) and an English proficiency test acceptable to the Board, or the equivalent which verifies that the applicant:

(A) - (C) (No change.)

(D) is currently registered/licensed as a first-level general nurse; and

(E) has achieved an approved score on an English proficiency test acceptable to the Board. [~~demonstrated proficiency in the English language; and~~]

[~~(F) passed the CGFNS Qualifying Exam, if submitting a CGFNS certificate.~~]

(3) - (5) (No change.)

(b) - (e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 26, 2005.

TRD-200500368
Katherine Thomas
Executive Director
Board of Nurse Examiners
Earliest possible date of adoption: March 13, 2005
For further information, please call: (512) 305-6823

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CHAPTER 220. NURSE LICENSURE COMPACT

22 TAC §220.2

The Board of Nurse Examiners (Board) proposes amendments to 22 Texas Administrative Code §220.2 (Issuance of a License by a Compact Party State), concerning Nurse Licensure Compact. Texas joined the Nurse Licensure Compact on January 1, 2000. This compact allows nurses licensed in Texas to practice in member states without having to apply for each member states' individual license. This proposed amendment will adopt the standard passed by the Nurse Licensure Compact Administrators (NLCA) requiring all nurse applicants for initial licensure in a compact home state to have passed the NCLEX or its predecessor examination in order to obtain a multistate privilege.

Once the compact is enacted in a state, each compact state designates a Nurse Licensure Compact Administrator to facilitate the exchange of information between the states relating to compact nurse licensure and regulation. On January 10, 2000, the NLCA was organized to protect the public's health and safety by promoting compliance with the laws governing the practice of nursing in each party state through the mutual recognition of party state licenses. (The Executive Director is the Texas compact administrator.) The Nurse Licensure Compact grants authority to the Compact Administrators to develop uniform rules to facilitate and coordinate implementation of the Compact. On Sunday, December 5, 2004, the NLCA passed the requirement that all applicants for initial licensure for a compact privilege must make a passing score on the relevant NCLEX exam. This rule will not affect licensure in Texas as Texas already requires the NCLEX for all licensure. It is for the purpose of having consistent compact rules in compact states. Compact states that do not require NCLEX for licensure, however, will only be able to grant a single state license to a nurse who has not taken the NCLEX or its predecessor exam, and that particular nurse will not be granted a multistate privilege to practice in other compact states.

Katherine Thomas, executive director, has determined that for the first five-year period the proposed amendment is adopted there will be no fiscal implications for state or local government as a result of implementation.

Katherine Thomas, executive director, has determined that for each year of the first five years the proposed amendment is adopted the public benefit will be that the proposed amendment will provide consistent standards in all compact states and a benchmark determination of nursing competency for purposes of the Compact. There is no known effect on small businesses and the anticipated cost to affected individuals as a result of this proposed amendment would be the cost of taking the NCLEX which is required of all nurses practicing in Texas.

Written comments on the proposal may be submitted to Katherine A. Thomas, MN, RN, Executive Director, Board of Nurse Examiners, 333 Guadalupe, Suite 3-460, Austin, Texas 78701.

This proposed amendment is pursuant to the authority of Texas Occupations Code §§301.151, 301.152 and 304.003 which authorizes the Board of Nurse Examiners to adopt, enforce, and repeal rules consistent with its legislative authority under the Nursing Practice Act. The adoption of the proposed amendments will further implement Texas Occupations Code Chapter 304.

§220.2. Issuance of a License by a Compact Party State.

(a) As of July 1, 2005, no applicant for initial licensure will be issued a license granting a multistate privilege to practice unless the applicant first obtains a passing score on the applicable NCLEX examination or its predecessor examinations used for licensure.

(b) [~~(a)~~] A nurse applying for a license in a home party state shall produce evidence of the nurse's primary state of residence. Such evidence shall include a declaration signed by the licensee. Further evidence that may be requested may include but are not limited to:

(1) a driver's license with a home address;

(2) voter registration card displaying a home address; or

(3) federal income tax return declaring the primary state of residence.

(c) [~~(b)~~] A nurse changing primary state of residence, from one party state to another party state, may continue to practice under the former home state license and multistate licensure privilege during the processing of the nurse's licensure application in the new home state for a period not to exceed thirty days.

(d) [~~(c)~~] The licensure application in the new home state of a nurse under pending investigation by the former home state shall be held in abeyance and the thirty day period stated in subsection (c) [~~(b)~~] of this section shall be stayed until resolution of the pending investigation.

(e) [~~(d)~~] The former home state license shall no longer be valid upon the issuance of a new home state license.

(f) [~~(e)~~] If a decision is made by the new home state denying licensure, the new home state shall notify the former home state within ten business days and the former home state may take action in accordance with that state's laws and rules.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 25, 2005.

TRD-200500348
Katherine Thomas
Executive Director
Board of Nurse Examiners
Earliest possible date of adoption: March 13, 2005
For further information, please call: (512) 305-6823

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CHAPTER 221. ADVANCED PRACTICE NURSES

22 TAC §221.2, §221.7

The Board of Nurse Examiners (Board) proposes amendments to 22 TAC §221.2 and §221.7, addressing Advanced Practice Nurses. Section 301.152 of the Nursing Practice Act states that advanced practice nurses are granted authorization to practice and utilize titles based upon their educational preparation. Advanced practice nurses who are authorized by the board in either the nurse practitioner or clinical nurse specialist role are also recognized in a particular specialty area appropriate to their educational preparation and must limit their advanced nursing practice to the role and specialty for which they have been educated. For example, an advanced practice nurse who is educated and authorized to practice as a pediatric nurse practitioner is not authorized to provide advanced practice nursing care to adults.

Concerns have increased regarding the increasing number of subspecialty areas in which nurses are seeking advanced practice authorization. Within the last two years alone, the board has received inquiries and requests for authorization to practice as an advanced practice nurse in subspecialty areas such as diabetes management, ophthalmology, forensic nursing, and palliative care. This issue has also raised concern at the national level. For some years, the Advanced Practice Registered Nurse (APRN) task force of the National Council of State Boards of Nursing (NCSBN) has had concerns regarding the proliferation of nurse practitioner and clinical nurse specialist subspecialty preparation. Educational preparation in a subspecialty area results in an individual with a very narrow scope of practice who may not be prepared to recognize a broad range of diseases and conditions commonly seen. From a regulatory perspective, there is concern that narrow specialty preparation does not provide a broad enough foundation for safe practice, including the identification and treatment of other presenting symptoms/problems and appropriate referral.

When jobs are not available in the narrow specialty area in which these applicants seek authorization to practice, advanced practice nurses prepared in these areas may seek to broaden their scope of practice without completing additional education. This places boards of nursing who recognize or license nurse practitioners and clinical nurse specialists in subspecialty areas in a position where they are faced with the challenge of limiting scopes of practice to the subspecialty area only. The Board has already seen disciplinary cases in which the advanced practice nurse prepared in a broader specialty area was found to be practicing outside his/her scope (e.g., clinical nurse specialist in psychiatric/mental health nursing practicing in thoracic oncology, adult nurse practitioner providing advanced practice nursing care to pediatric patients).

Due to this concern, the Board at its April 2003 meeting charged the Advanced Practice Nursing Advisory Committee (APNAC) with reviewing APN titles currently recognized by the Board and recommending whether such titles should continue to be recognized in the future. The committee completed that charge and recommended that the titles recognized by the Board be limited to specialty areas that include broad-based educational preparation and to areas for which there is a national certification examination specifically targeted for both the role and the specialty that already exists or is about to be released. The committee completed a survey of member boards to determine whether other jurisdictions recognized some of the titles it proposes to eliminate. An overwhelming majority of the boards who responded (34 state boards) do not recognize the titles being requested for elimination.

The board adopted the committee's recommendation to propose an amendment to §221.2, relating to Authorization and Restriction to Use of Advanced Practice Titles. The proposed amendment continues to include those titles that the committee recommended the Board continue to recognize. The APNAC also requested that the Board consider the proposal of an amendment to §221.7, relating to Petitions for Waiver. The latter would create a time-limited exception for those individuals who might currently be enrolled in an advanced educational program of study that prepares them to function in a role and specialty that is currently recognized by the Board but not included in the recommendation for continued recognition. This exception would permit these individuals to be authorized to practice as advanced practice nurses in these specialty areas and would limit their practice to the geographical boundaries of the State of Texas. At the July 2004 meeting, the Board voted to propose amendments to §221.2 and §221.7, relating to advanced practice titles. The rule was published in the *Texas Register* on August 13, 2004.

The board office received many written comments on these proposed amendments. The comments received from state and national organizations were compiled, summarized and responses drafted. Many other comments were received from individuals who expressed concern regarding one particular practice-related issue.

Additional comments were received during a public hearing held on October 20, 2004. During that public hearing, staff presented additional information that outlined the historical perspective and rationale for the proposed rules. Comments were then received from sixteen individuals and representatives of various organizations. Three individuals representing themselves and a representative of the Staff of the Utah Board of Nursing spoke in support of the proposed amendments. Four individuals and eight organizational representatives spoke against adoption of the proposed amendments. Comments not in support of the proposed amendments reiterated comments already received during the written comment period. During the public hearing, the Texas Nurses Association (TNA) requested a six month moratorium on action related to this rule amendment to allow time for the issue related to titles to be addressed at the national level because it believes this issue has implications for advanced practice beyond the State of Texas.

On December 16, 2004, the American Nurses Association (ANA) hosted a meeting of national advanced practice registered nurse stakeholder organizations to discuss this issue at the request of TNA. Dr. Rounds and Ms. Thomas attended this meeting on behalf of the Board. The model for regulation of advanced practice nurses that appeared to have the greatest support from the profession was to license the advanced practice nurse in the broad roles as either a nurse-midwife, nurse anesthetist, nurse practitioner, or clinical nurse specialist without regard to specialty preparation. In order to do so, however, the Board believes that regulation must be able to assure the public that individuals licensed with each of these titles are educated broadly across patient populations and practice settings rather than the current specialty and subspecialty focused model for advanced educational preparation and subsequent examination. In addition to broad-based educational preparation, examination must also

test for entry-level competency at the advanced practice level across that same broad base.

In order to progress from the current specialty and subspecialty focused model for education and examination to the model that appeared to have the most support from the profession, a stepwise approach must exist. The Board currently recognizes 19 nurse practitioner and 22 clinical nurse specialist specialty and subspecialty titles. It would be virtually impossible to proceed from this current model of regulation to that proposed by the profession in a relatively short period of time particularly when the Board continuously receives requests to recognize additional titles not currently recognized. The APNAC's recommendation for revisions to §221.2 and §221.7 that were presented for the Board's consideration in July 2004 is a logical step from the current model to that discussed at the meeting hosted by ANA on December 16. The proposed amendments presume that less specialization and broader preparation are essential for licensure at the advanced practice level. Specialization and subspecialization would then be considered value-added after Board recognition for authorization to practice at the advanced practice level is granted. The Board would like to acknowledge and respond in the following paragraphs to the comments received in response to the initially proposed amendments to the rules.

The Board received written comments from the following interested groups or associations: Texas Nurses Association (TNA) (Willmann), Coalition for Nurses in Advanced Practice (CNAP) (Woolbert), American Nurses Association /American Nurses Credentialing Center (ANA/ANCC) (Carson-Smith), National Association of Clinical Nurse Specialists (NACNS) (Clark), Texas Clinical Nurse Specialists (TxCNS) (unsigned), American Association of Colleges of Nursing (AACN) (Bartels), University of Texas at Austin (UT) (Clark/John/Coward/Shine), American Board of Nursing Specialties (ABNS) (Niebuhr), Wound Ostomy Continence Nursing Certification Board (WOCNCB) (Walden/Wright), Lance Armstrong Foundation (LAF) (Miller), Association of Community Cancer Centers (ACCC) (Baker), American Cancer Society - Texas Division (ACS) (Hornaday/Redrow), American Society of Clinical Oncology (ASCO) (Johnson), Oncology Nursing Society (ONS) (Stanley/Ponto), University of Texas at Arlington (UTA) (Perley), Hospice and Palliative Nurses Association (HPNA) (Dahlin), National Board for Certification of Hospice and Palliative Nurses (NBCHPN) (Martinez), Texas & New Mexico Hospice Organization (TNMHO) (Farrow), American Academy of Hospice and Palliative Medicine (AAHPM) (Cleary), and 67 individuals.

In addition, the Board held a public hearing on October 20, 2004. Testimony was received from five individuals and eleven representatives of organizations. The following organizations were represented: NACNS and TxCNS (Clark), TNA (Wieck), ANA (Bickford), ANCC (MacDonald), Utah Board of Nursing/Nurse Licensure Compact Administrators/National Council of State Boards of Nursing APRN Task Force (UTBON/NLCA/NCSBNAPRNTF) (Poe), Texas and New Mexico Hospice Association (TNMHO) (Farrow), ONS (Lundgren), Adams (UT at Arlington), American Holistic Nurses Association (AHNA) (Erickson), UTHSC at Houston (McNeill), and ONCC (Williams). Comments were received both in support and in opposition of the rule.

Comment: The grandparenting provision as proposed in the preamble should be in rule with language authorizing APNs to use current authorizations approved by the board though not included in subdivisions (a)(3) and (4). CNAP

Response: The Board agrees with this suggestion and will add the grandparenting provision to §221.2(b) as proposed.

Comment: Restraint of trade issues due to negative effect on schools of nursing that have invested in planning solid, broad-based programs that allow CNS specialization in a variety of fields. Rules imply that the Board is more capable of curriculum development than are doctorally-prepared faculty who are also CNSs or NPs. NACNS

Response: The Board disagrees with this comment. Schools of nursing and nursing programs are not faced with the challenges associated with licensing advance practice nurses, whether that grant of authority is for practice within a narrow or broad spectrum. The Board does not control or mandate specialty nursing curriculum developed by the schools. By the same token, the minimum educational requirements the Board seeks to establish for licensure in advance practice nursing can not be controlled or mandated by nursing programs or schools of nursing. Nursing schools remain free to develop educational programs that address specialty areas of their choice. While the Board recognizes that its rules may influence the development of nursing programs, the Board believes that it must uphold the public trust legislatively mandated to it and attempt to define the proper recognition for advanced practice nurses. The Board believes it has done so reasonably by taking into account the potential impacts on the future of nursing programs.

The Board believes that subspecialty practice is valuable and may continue under this proposed rule; however, the Board also believes that the role of regulation is to approve advanced practice nurses for entry into advanced practice and that it is both impractical and not in the public's best interest to provide legal authorization in continually narrowing areas of subspecialty. Under this proposed rule, schools of nursing do not need to eliminate subspecialty content from their curricula. The Board requires a minimum of 500 clinical hours in the broad-based specialty areas it proposes to continue to recognize. Because subspecialty practice would not require recognition from the board, programs could offer intensive subspecialty courses as electives for students within the broad-based program. For example, an adult nurse practitioner student whose program includes 750 hours of clinical experiences could complete experiences beyond the 500 hour minimum in adult health in such areas as diabetes management or palliative care. This gives the individual a broad foundation for entry into advanced practice but also provides additional expertise in a specific subspecialty area. Schools might also offer this content as post-master's options for individuals who are already advanced practice nurses. Although schools may argue that APNs are unwilling to do this, staff receives a number of APN applications each year from individuals who completed post-master's study.

The Board does not agree that the proposed rule implies that the Board is more capable of curriculum development than doctorally-prepared faculty. The Board function is to license advance practice nurses when it can verify that it is in the public's interest to do so. The Board has been asked to recognize advance practice nurses in nursing specialties developed by nursing programs for which no jobs exist, for which graduates may not be able to be recognized in Texas or elsewhere, and for which the advanced practice nurse is at significant risk to exceed his/her scope of practice. Recently, for example, a graduate of a clinical nurse specialist in neonatal nursing program contacted the board office requesting information regarding how she was expected to

maintain her APN authorization if she was unable to find employment to complete the current practice hours. She was living in a major metropolitan area in Texas and was unable to locate employment in her role and specialty. She stated that she had never been advised that there is little regulatory recognition of the CNS role in her specialty area of neonatal nursing throughout the country nor that she might anticipate difficulty in locating employment as a CNS in neonatal nursing. She was considering accepting a position as a neonatal nurse practitioner at the time she contacted the board office, a position that would have required her to exceed her recognized scope of practice. The proposed rules would avoid these potentially dangerous predicaments. The Board wishes only to verify that APN curriculum contains sufficient content such that each individual who holds a specific title meets the same minimum level of competence for entry into advanced practice and that he/she is sufficiently educated to recognize a broad range of diseases and conditions common to patients in a specialty area.

Comment: Certification organizations will also be negatively affected economically. NACNS

Response: The Board disagrees the proposed rule must be modified based on this comment. Even assuming there may be an economic impact on certification organizations (although the Board has not seen any evidence of this), the Board's mission is public safety, and the Board should not be controlled by the economic interest of certification organizations. The Board would point out that each of the specialties listed in the proposed rule has a corresponding national certification examination that will continue to be required as a condition for authorization to practice as an advanced practice nurse. The Board also believes that once an advanced practice nurse is licensed by the Board, a national certification could allow APNs to demonstrate additional expertise in a subspecialty area such as oncology, diabetes management, or palliative care. APNs could take these additional examinations and utilize the certification credentials without the need for additional authorization from the board. Board staff is aware of APNs who have obtained national certification (in addition to that required for authorization to practice) despite that certification not being recognized by the Board. For example, staff have talked with family nurse practitioners who have obtained additional certification in diabetes management and clinical nurse specialists in medical-surgical nursing who have obtained national certification in oncology. Additionally, a gerontological nurse practitioner who has obtained certification in palliative care provided testimony during the public hearing. Thus, it is possible that certification bodies will see an increase in the numbers of individuals sitting for these examinations.

Comment: Concerns about eliminating recognition for many CNS specialties because many CNSs educated out of state will not be able to identify themselves as CNSs in this state, therefore discouraging them from moving to this state in time of a nursing shortage. CNAP, one individual.

Response: The Board disagrees. The new rules are designed to eliminate the misconception by nurses educated as CNSs, as well as the public, that the Board must recognize all CNS specialties and subspecialties. Even before this proposed rule, the Board did not recognize all purported or promoted CNS specialties. The CNS specialty titles that the Board proposes to continue to recognize are based on a broad educational foundation for entry into practice at the advanced level. The titles have a confirmed history of quality education, competency, and broad applicability. They do not focus on a specific disease entity but rather on the total health care needs of individuals within the specialty area. Although the patients served by CNSs may have a primary medical diagnosis such as cancer, these patients also have or will develop co-morbidities. A CNS prepared in a narrow subspecialty area (such as a disease entity) is not necessarily prepared to provide advanced nursing care to the total patient. Thus, the CNS may be prepared to provide advanced practice nursing care for needs related to a cancer diagnosis, but may not be prepared to also provide advanced practice nursing care for the same patient's hypertension, diabetes, and asthma. No consistent educational standards exist for such subspecialty areas nor is there consistency in educational preparation among graduates of such programs. For example, staff has reviewed educational preparation for two graduates of two different CNS programs in oncology nursing. The first applicant's advanced educational program included some broader content that addressed the care of some co-morbidities commonly seen in oncology patients. The second applicant's program did not include this content, focusing almost entirely on the cancer diagnosis. Even the pathophysiology course included in the second applicant's curriculum focused entirely on the pathophysiology of cancer. Based on such differences in educational preparation, these two individuals would have somewhat different scopes of practice. Without guidance provided by the proposed rule, the Board is faced with a choice of whether to grant both individuals the same title CNS in oncology nursing and the public, employers, third party payers, et. al. presume that because they have the same title, they have the same scope of practice.

Significant differences in educational preparation within a specific subspecialty could potentially create difficulty for the Board in evaluating scope of practice for enforcement purposes. When advanced practice nurses are reported to the board for issues related to practicing beyond their scope, the burden of proof rests with the board. In the aforementioned scenario, it would be impossible for the board to determine whether these individuals have equivalent scopes of practice based on title alone.

While it is true that some historically recognized titles will be grandfathered, but no longer licensed in the future, it is also important to note that these titles do not have a corresponding national certification examination targeted for individuals educated specifically in the APN role and specialty area. When reviewing other types of professional licensure, it is noted that entry into practice includes requirements for both educational preparation and examination to assure the public the professional demonstrates minimum competence for safe entry into practice. Although CNSs are registered nurses (RNs) and have passed that licensure examination, the CNS role requires mastery of knowledge, skills and abilities that are beyond the RN scope of practice. Requiring an advanced practice nurse to pass a reliable, valid, psychometrically sound and legally defensible national certification examination provides an objective mechanism to assure the public that the individual possesses the knowledge and abilities required for competent practice in the advanced role and specialty that will be recognized by the board.

Comment: CNSs who do not include medical management in the scope of their role, recommend the option of being authorized to use the title, "clinical nurse specialist." CNAP

Response: The Board does not agree that this recommendation can be considered under current rules or under the proposed rule. There is significant variation in CNS education, not only within the state of Texas, but also within an institution. Staff is aware of one institution that offers a CNS track that includes

medical diagnosis and management content. Another CNS track within the same academic institution does not offer this option. Within the State of Texas, very traditional CNS programs currently exist that offer no medical management content, some that include medical management content, and others that offer the medical management content as an option. Likewise, graduates of CNS programs outside the State of Texas reflect similar variations in educational preparation.

At this point, it would appear to be confusing to the public for the Board to create two categories of individuals recognized in the CNS role those who include medical management in the scope of their role and those who do not. However, the variations of CNS education and scope of practice deserves further study by the Board.

Comment: Section 221.7 regarding waiver mechanism for students currently enrolled in APN programs that specialize in areas outside of those listed in the rule creates a degree of uncertainty for these students and recommend delayed implementation date for new graduates seeking provisional authorization and APNs from other states seeking interim authorization. Therefore, no waiver process. "Waiver" should be "exemption." CNAP, TNA (recommends 1/1/2008 implementation date)

Response: The Board agrees there may be some confusion and anxiety for students and new graduates of programs. In an effort to relieve this potential uncertainty for students, the Board agrees to change the term "waiver" to "exemption." Further, the Board agrees to extend the period during which applicants may be granted an exemption using titles outside of those listed in proposed §221.2 to January 1, 2010, to allow for a longer period of time for students enrolled in programs as well as advanced practice nurses from other states.

Comment: If the Board decides to proceed with the waiver, explicit language should be added 1) grandparenting in APNs recognized prior to 1/1/2004 with non-sec. 221.2 titles, and 2) addressing their authority, or lack of authority, to practice outside the geographical boundaries of Texas. Also, what non-sec. 221.2 titles will be recognized prior to 1/1/ 2005 under the waiver should be explicitly stated in rules. TNA

Response: As stated previously, the Board agrees to include grandparenting language related to those APNs approved prior to the effective date of the rule. The Board also agrees to explicitly list titles that may be recognized under the exemption in proposed amendments to §221.7(e). The Board does not see significant value in including language in the proposed rule about the authority of grandparented APNs outside the state's geographical boundaries. It is suggested that this might be more appropriately addressed later if Texas elects to enter the APRN Compact.

Comment: Restrictions of titles should occur as an overall strategy for boards of nursing to recognize only the four basic APN types: Nurse Practitioner (NP), Clinical Nurse Specialist (CNS), Certified Registered Nurse Anesthetist (CRNA), and Certified Nurse Midwife (CNM). APN specialties would be through private certifying bodies. TNA

Response: The Board does not agree that this is possible at this point in time given the historical evolution of advanced practice licensure and the number of NP and CNS titles recognized by the Board. It should be noted that the new rule would likely encourage a step to uniformity in advanced practice titles and recognition that may be an example nationally. Staff believes this comment suggests modeling advance practice nursing similar to medical licensure with post licensure specialty certification and is a logical long-term step in advanced practice nursing regulation. The Board will monitor closely the national debate regarding APN practice. The Board wishes to be at the forefront should there be mutual agreement between the education, certification, and regulation communities at a national level in this area. The Board believes that a national and uniform policy regarding advance practice will be in the public's interest. However, the Board believes that before basic recognition is accomplished as suggested by the commenter, all stake holders would need to agree on a single broad-based curriculum and testing for NPs and CNSs, similar to those utilized by CRNAs and CNMs. Once the NP or CNS completed the educational preparation and initial examination, the NP or CNS could then specialize through additional education and certification awarded by private certifying bodies in the same manner that RNs are educated and then obtain additional education and/or certification in a specialty area.

Comment: Regulations are not rationally related to a legitimate state purpose, exceed the authority of the Board, and are tantamount to economic regulation of practice. ANA/ANCC

Response: The Board disagrees with this statement. Section 301.152 of the Texas Occupations Code (Nursing Practice Act) grants the BNE authority to adopt rules that include but are not limited to the minimum requirements for authorization to practice as an advanced practice nurse in the State of Texas. This section states as follows: Sec. 301.152. Rules Regarding Specialized Training.

(a) In this section, "advanced practice nurse" means a registered nurse approved by the Board to practice as an advanced practice nurse on the basis of completion of an advanced educational program. The term includes a nurse practitioner, nurse midwife, nurse anesthetist, and clinical nurse specialist. The term is synonymous with 'advanced nurse practitioner.'

(b) The Board shall adopt rules to:

(1) establish:

(a) any specialized education or training, including pharmacology, that a registered nurse must have to carry out a prescription drug order under Section 157.052; and

(b) a system for assigning an identification number to a registered nurse who provides the Board with evidence of completing the specialized education and training requirement under Subdivision (1)(A);

(2) approve a registered nurse as an advanced practice nurse; and

(3) initially approve and biennially renew an advanced practice nurse's authority to carry out or sign a prescription drug order under Chapter 157.

Furthermore, authorization to practice as an advanced practice nurse in any role and specialty from the Board of Nurse Examiners must serve the purpose of providing the public with assurance that certain minimum criteria have been met and all individuals who are authorized to use a specific title have the same core knowledge, skills, and abilities, regardless of where they completed their educational preparation. Those titles included in the list for continued recognition are believed to meet this criterion. Those not included in that list generally do not (as indicated

in the aforementioned example regarding two CNSs in oncology nursing).

In limiting the advanced practice titles to those included in the proposed rule, the Board seeks to further assure the public that advanced practice nurses possess the knowledge, skills and abilities necessary to meet the complex health care needs of their patients. The very complexity of the health care needs of the advanced practice nurse's patient populations demands that the APN have a broad underlying educational foundation for practice, regardless of whether the APN chooses to limit his/her practice to a subspecialty area. Nurse anesthetists, for example, do not limit their educational preparation to only anesthesia for cardiac cases or obstetric populations; rather, they complete broad educational preparation as the foundation for a practice that may be limited to patient populations with a common thread such as cardiac disease or pregnancy.

It is important to understand that the scope of practice of advanced practice nurses has evolved and increased significantly in terms of the complexity of services provided services that exceed the scope of practice of the registered nurse. As such, the potential for harm to the public is significantly greater and a requirement for broader-based educational preparation for entry into advanced practice is warranted.

It should also be noted that advanced practice nurses prepared in narrower specialties may have significant difficulty finding employment, and the Board does not wish to perpetrate these difficulties. When these individuals are unable to find employment within their specialty, they may accept employment as advanced practice nurses in specialty areas that are outside their authorized scope of practice. With a broader based educational foundation, the advanced practice nurse would have the ability to transition into subspecialty areas without being in violation of the rules related to scope of practice.

There is significant variation in the regulation of advanced practice nurses from one state to another and advanced practice nurses with subspecialty preparation may have difficulty obtaining authorization in other states. Staff surveyed other boards of nursing to inquire whether those states also recognized individuals with some of the titles the Board proposes to no longer recognize. Of the thirty four (34) jurisdictions that responded, only five recognize CNSs or NPs in oncology, only four recognize CNSs in maternal-child health nursing, and only two recognize palliative care nurse practitioners.

In summary, the Board believes that the proposed rules are rationally related to a legitimate state purpose and do not exceed the authority of the Board in any way.

Comment: To determine the best approach to regulation, the Board should discuss the value given to the RN license when evaluating APN expertise, instead of writing rules as if APN practice is a second level of independent licensure. ANA/ANCC

Response: The Board disagrees with this comment. As stated above, authorization to practice as an advanced practice nurse in any role and specialty from the Board of Nurse Examiners must serve the purpose of providing the public with assurance that certain minimum criteria have been met and all individuals who are authorized to use a specific title have the same core knowledge, skills, abilities, and educational preparation, regardless of where they completed their educational preparation. Those titles included in the list for continued recognition generally meet this criterion. Those not included in that list generally do not (as indicated in the aforementioned example regarding two CNSs in oncology nursing).

In limiting the advanced practice titles to those included in the proposed rule, the Board seeks to further assure the public that advanced practice nurses possess the knowledge, skills and abilities necessary to meet their patients' complex health care needs. The very complexity of the health care needs of the advanced practice nurse's patient populations demands that the APN have a broad underlying educational foundation for practice, regardless of whether the APN chooses to limit his/her practice to a subspecialty population. Nurse anesthetists, for example, do not limit their educational preparation to only anesthesia for cardiac cases or obstetric populations; rather, they complete broad educational preparation as the foundation for a practice that may be limited to patient populations with a common thread such as cardiac disease or pregnancy.

The Board recognizes that the advanced practice nurse's scope is built upon education and licensure as a registered nurse. However, an advanced practice nurse's scope of practice significantly exceeds that of the registered nurse and is not authorized unless sanctioned by the Board based on the minimum criteria for recognition. For example, the advanced practice nurse's scope may include medical diagnosis and management of patients, but the RN's scope does not include these activities. It is also important to understand that the scope of practice of advanced practice nurses has evolved and increased significantly in terms of the complexity of services provided services that exceed the scope of practice of the registered nurse. As such, the potential for harm to the public is significantly greater and a requirement for broader-based educational preparation for entry into advanced practice is warranted. Although advanced practice nurses work collaboratively with physicians, they are engaged in activities that include but are not limited to making medical diagnoses and ordering appropriate pharmacologic and non-pharmacologic management. The knowledge, skills, and abilities required to provide advanced practice nursing care build upon but significantly exceed those acquired through entry-level nursing education programs that prepare individuals as registered nurses.

Comment: No potential harm to the public is mentioned as justification for rules, but regulatory ease. ANA/ANCC, NACNS, TNMHO

Response: The Board disagrees with the comment for reasons previously stated. Further, the comment ignores the need to prevent regulatory practices that could lead to harm to the public before those practices occur.

Comment: Rule never adequately defines "subspecialty" limitation, and its application of the term falls outside of the profession's definition and comprehension of specialty. ANA/ANCC

Response: The Board disagrees. It has utilized the term "subspecialty" in the preamble to the proposed rule to explain the basis for limitation of titles in the rule. The term is not in the rule itself and does not need to be defined.

Comment: Based on ANA's criteria for determining specialty practice, oncology, geriatric nursing and diabetes education should be specialties. ANA/ANCC

Response: The Board disagrees with the comment and would note that the ANA is a professional organization that exists for the purpose of serving the interests of the nursing profession. While

ANA/ANCC's interests often directly support the Board's mission, the ANA/ANCC are responsible to their members (nurses) rather than the public and address specific issues that best serve their members' needs. They have determined their own criteria for determination of specialty practice to serve the needs of their members. As such, the ANA's purpose for defining specialty practice differs from that of the Board.

The Board's mission is to protect and promote the public welfare and that mission supercedes any special interest groups, including professional organizations. The Board's rule is designed to better address the public's interests by limiting the number of specialties and subspecialties now seeking recognition as advanced practice nurses and assuring that individuals authorized to practice as advanced practice nurses have broad enough educational preparation to care for the whole patient. The narrow focus of the educational preparation in such subspecialties as oncology and diabetes and the risk for public harm as a result of such narrow preparation has already been addressed above.

Comment: Education programs have many filters and safeguards to assure competency, i.e., broad-based curricula, 500 hours minimum (AACN Master's Essentials and NACNS Statement on the Clinical Nurse Specialist Practice and Education, 2d ed. (2004)). NACNS

Response: The Board disagrees. Although some programs may meet these criteria, the Board has already provided examples of education programs that do not have broad-based curricula. The Board can also provide examples of advanced educational programs that do not include a minimum of 500 clinical hours in the advanced educational program (2003 graduate of a CNS program) as well as numerous examples of applicants who recently completed programs that do not meet the standards outlined in the *AACN's Essentials of Master's Education*, despite the fact that these standards have existed for more than eight years.

Although accrediting bodies survey advanced educational programs, they survey graduate programs as a whole. Historically, they have not reviewed each individual advanced practice nursing track within a graduate program to verify that graduates complete essential content for entry into practice at the advanced practice level. Although the accrediting bodies have recognized this omission and their standards and survey criteria have recently changed to focus on APN programs more specifically, program review occurs only every eight to ten years. It should also be noted that advanced educational programs that are not accredited by a national nursing education accrediting body continue to exist. Graduates of these programs have been permitted to obtain national certification despite no external review of the program.

Comment: More harm to the public from using a generalist exam for advanced specialization knowledge. NACNS

Response: The Board disagrees with this comment for reasons stated above.

Comment: The Board has chosen to define specialization and subspecialization without collaborating with state and national leaders in CNS specialty organizations in a national forum. NACNS, one individual

Response: The Board disagrees. The discussions utilizing the terms "specialization" and "subspecialization" have been helpful in outlining the issues surrounding advanced practice nurse licensure and the Board's proposed rules to limit title recognition. However, the Board has not included definitions of specialization or subspecialization within the proposed rules because it is not necessary. Additionally, the Board would disagree that it has failed to collaborate with state and national leaders in CNS specialty organizations. One of the NACNS's directors is a member of the APN Advisory Committee that discussed these proposed revisions for more than a year in open meetings and that were presented for Board review in substantial similar form as proposed. A former NACNS director is also a member of that advisory committee. The current president-elect of the NACNS attended one of the advisory committee meetings. The proposed rule was recommended for Board adoption as a consensus of the committee that included these members.

The APN advisory committee meetings were open meetings, and notice of the meetings as well as the agendas are routinely published in the *Texas Register*. Notification that the committee discussed issues related to APN titles was also published routinely in the Board's quarterly newsletter. Other than one meeting attended by the president-elect, no other representatives of CNS organizations contacted Board staff regarding the committee's work or a desire to address the committee.

It should also be noted that these individuals have been invited to participate in an ongoing dialogue with the regulatory community through the National Council of State Boards of Nursing's APRN Task Force. After much discussion with these organizations over a period of several years, the Task Force has issued a position statement outlining its recommendations for regulation of advanced practice nurses. The Board and APNAC members have reviewed this statement, and considered that statement in the development of the proposed rule. In this manner, the Board has obtained input from representatives of national professional organizations.

Comment: NACNS and ANCC are working on a CNS core certification exam that will be administered by ANCC and will be psychometrically sound and legally defensible. The Board should support development of such solutions instead of creating more barriers to CNS practice. NACNS

Response: The Board disagrees that it is creating barriers to practice. When the exam is released, the Board will consider the new examination and review it based on the criteria for review of national certification examinations adopted by the Board in October 2003. Based on the results of that review, the Board may choose to consider recognizing this examination if it sufficiently meets the criteria established by the Board. Certification examinations are used by regulatory authorities as an objective demonstration of competence for practice in a profession. Thus, it is regulation that must determine whether a specific examination is acceptable for this purpose and whether it can defend the requirement for completion of a specific certification process rather than the certifying body or the profession.

Comment: The Board should delay action on this rule until national concensus is reached about the nature of specialization, subspecialization, regulation, and credentialing among all stakeholders. TxCNS, TNA, AACN

Response: The Board disagrees. If the public interest is served by these proposed rules, the Board believes there is no justification to delay action. The issues identified in the comments have been discussed at the national level for ten years, and a recommendation for regulation has been clearly stated by many regulators and their representatives at the National Council of State Boards of Nursing. It appears to the Board that consensus

among the commenter's identified "stakeholders" is not likely to occur in the near future. Some jurisdictions already limit the titles recognized. Credentialing and education have continued to develop new subspecialty educational programs and examinations without regard for the concerns put forth by Boards of Nursing or in pursuit of national consensus. Rather than working toward national uniformity or consensus, there appears to be continuing request for approval of educational programs for more and more specialized scopes of practice and newly created certification examinations to match them.

Comment: Potential economic harm to individuals who are unable to practice their trade as a specialist and harm to clients due to denial of highly qualified specialist care. TxCNS, AACN

Response: The Board disagrees. It believes that this is not likely to cause economic harm to advanced practice nurses or their patients. This proposed rule does not prevent an advanced practice nurse from obtaining certification from private organizations nor does it limit where a nurse chooses to practice. In fact, the Board believes that the result of these rules will be more economic opportunity for APNs. Advanced practice nurses with broader educational preparation are more marketable in that they can provide for the health care needs of the whole patient rather than just a single disease entity. This ultimately decreases costs to the patient as well in that the patient is then less likely to have to spend a great deal of time and money seeing multiple health care providers for their health care needs. Further, the Board's proposed rules do not limit the assumption of subspecialty knowledge, skills, and abilities that can be desirable and marketable once licensed as a APN.

Comment: Proposed rules will freeze NP and CNS titles and indirectly specialty roles at an arbitrary point in time and may interfere with the natural evolution of APN specialty roles. TNA

Response: The Board disagrees. The Board is not opposed to consideration of additional titles in the future should additional broad-based specialties emerge. The rule is open for review and possible revision at least every four years as required by the Texas Government Code or more often as deemed necessary by the Board.

Comment: If titles are limited to some finite list of specialty titles, what titles should be on the list may need further discussion. TNA

Response: The Board disagrees. The proposed list of titles has been discussed for more than a year in open meetings by the APN advisory committee at the Board's direction. Over the course of that year, a number of individuals have attended those meetings and provided input to the committee, including but not limited to an APN educator, APNs in practice, the president-elect of the NACNS, and an applicant for authorization to practice as an advanced practice nurse who had a vested interest in the committee's recommendation. This issue has been discussed nationally with the Board's involvement and input for an even longer period of time.

The Board believes that the proliferation of ever narrowing specialties gives reason to limit titles at this time. The addition of multiple new narrow specialty titles only continues to authorize individuals to practice who are not prepared broadly enough and creates an increasingly heavy administrative burden on the agency.

Comment: Use of "may" in §221.2(a) should be changed to "shall be." TNA

Response: The Board agrees with this comment and will make the suggested change.

Comment: Recommends deletion of the geographical limitation on APNs with non-sec. 221.2 titles because beyond Board's rule-making authority until Texas adopts multistate compact. TNA

Response: The Board disagrees that it does not have the authority to state that any advanced practice nurse's authorization to practice is limited to the State of Texas. Board staff has received numerous calls from individuals who believed that the Nurse Licensure Compact for RNs included advanced practice designations. Provisions for waiver of the master's requirement for certain certificate-prepared women's health nurse practitioners and nurse-midwives already exist in current §221.7(d). These provisions have been in the rule since 2001, and there has been no discussion that such a limitation was beyond the Board's rule making authority since the adoption of that language.

Comment: By limiting the specialties which would have title protection, the public's access to knowledgeable and experienced APNs is being hindered. ABNS, ONCC, AHNCC, ONS

Response: The Board disagrees with this comment. The Board is not rescinding any current advanced practice nurse's authorization to practice nor does the rule prevent nurses from becoming certified by private organizations. The Board has also agreed to clarify its grandparenting provision. The Board intends to utilize the rule to provide better assurance to the public that APNs who hold a Board authorization are prepared to provide for a patient's specific health care need as well as a broad range of co-morbidities that may be contributing to the patient's overall health status. The Board is concerned that APNs who are prepared in narrow specialty areas are not prepared to recognize and appropriately manage or refer other co-morbid conditions the patient may have.

Comment: ABNS challenges the Board to justify the cost to Texas consumers in its call for a specialty nursing certification board to demonstrate compliance with criteria identified in Texas that are the same as those already deemed acceptable by NCSBN at the national level. ABNS

Response: The Board is uncertain of the meaning of this comment. The Board has adopted examination review criteria for those examinations it accepts. The Board is aware that NCSBN has a review process in place, but the Board has not determined that it will accept the NCSBN review in lieu of completing its own review. In addition, the Board must have a mechanism to review national certification examinations when they are new examinations not previously recognized by the Board and to review examinations about which the Board receives substantive complaints. National certifying bodies want boards of nursing to utilize their certification processes for regulatory purposes. In order to do that, however, boards of nursing must have criteria for acceptable examination processes and a mechanism in place in order to assure the public that the examination is actually testing what it is intended to test, especially when substantive complaints about the examination are received.

Comment: ABNS urges the Board to accept APN specialty certification examinations accredited by ABNS and authorize practice and title protection to those practicing in accredited specialties. ABNS

Response: The Board does not accept this recommendation. The Board does not agree that authorization to practice as an advanced practice nurse can be dictated by any certification examination accredited by ABNS. Professional organizations, such as ABNS, are responsible to their members certifying organizations. They do not have a primary responsibility to protect the public. To automatically defer to a private accrediting program as the appropriate regulatory review would be an improper delegation of agency authority in violation of the constitutional non-delegation doctrine. Further, there does not appear to be the appropriate safeguards in place to warrant such a delegation or deference. The ABNS reviews and accredits national certification examinations for nurses at all levels, including nurses who are not APNs. Additionally, ABNS accredits examinations that are targeted for many subspecialty practices and exams that do not meet the criteria outlined in the Board's previously approved examination review criteria. For example, the national certification examination for palliative care may be taken by individuals who completed a specific program that prepared them in palliative care or by APNs who completed other types of programs but have worked a limited number of hours in palliative care. Accepting this certification exam would ignore the education requirement that must also be met.

Authorization to practice as an advanced practice nurse in any role and specialty from the Board of Nurse Examiners must serve the purpose of providing the public with assurance that certain minimum criteria have been met and all individuals who are authorized to use a specific title have the same core knowledge, skills, abilities, and educational preparation, regardless of where they completed their educational preparation. The proposed amendment continues to recognize those titles that generally meet this criterion. Those not included in that list generally do not (as indicated in the aforementioned example regarding two CNSs in oncology nursing). ABNS accreditation cannot assure the Board that certifying bodies continue to enforce or require the same standard.

Comment: TNA urges a six month moratorium on changes to the rule as well as a six month moratorium on recognition of new titles by the Board to allow for participatory discussion of this issue by stakeholders at the national level. TNA, UT at Arlington

Response: The Board has agreed to the six month moratorium. The original proposed rule has been withdrawn. New rule amendments are proposed that include substantive and non-substantive changes as recommended in some of the comments received. This will allow for further discussion of this issue for a six month time period.

Comment: Advanced practice nurses for whom no national certification examination exists should not be recognized by the Board. Examination provides for an objective measure of competence that cannot be guaranteed based on graduation from a program. UTBON/NLCA/NCSBNAPRNTF, Individual comment

Response: The Board agrees. Psychometrically sound examinations that meet criteria specified by the Board provide for an objective measure of entry level competency in an advanced practice role and specialty that is legally defensible. Although alternatives to examination may seem attractive to the profession, there are no alternatives that provide the opportunity to measure entry-level competency in a manner that is equally as objective as examination. Furthermore, such alternatives are not likely to survive legal challenge should such challenge arise.

Comment: The increasing number of titles causes confusion for the public, legislators, and regulators. Individual comment

Response: The Board agrees with this comment. Staff can provide numerous examples of inquiries regarding advanced practice titles and individual scope of practice from the public, other health care providers, other regulatory entities, and offices of public officials. The additional use of certification and education credentials causes concern for individuals who are not clear what each means.

In situations in which two advanced practice nurses bearing the same title have different scopes of practice based on differences in educational preparation (such as the aforementioned examples of the two CNSs in oncology nursing), the public, employers, and other health care providers become confused and frustrated when trying to determine the services that each individual may provide. In such situations, decisions regarding such issues as credentialing are then left to an employer who may be unskilled in reading and interpreting transcripts and course descriptions or who is not knowledgeable regarding advanced practice nursing curricula. Additionally, the Board is concerned that advanced practice nurses with narrower scopes of practice are increasingly placed in positions where they are pressured to accept assignments for which they lack appropriate educational preparation and that are beyond their scopes of practice. This is of particular concern in situations in which two advanced practice nurses have the same title but differing scopes of practice based on differences in educational preparation.

Comment: Graduate nursing programs would have increased flexibility in their ability to develop subspecialty tracks provided there is a core platform for education in a broad specialty. Individual comment

Response: The Board agrees. The majority of the advanced practice programs in the State of Texas have in excess of 700 clinical hours. Both national standards and current Board rules only require a minimum of 500 hours be completed in the specialty area. Thus, a program could offer a broad-based specialty with at least 500 hours of clinical experience (such as adult health) as the foundation of the program with electives that include didactic and clinical content in subspecialty areas (such as palliative care). In doing so, the graduate completes broad-based education to care for the total health care needs of the patient but also gains additional expertise in a subspecialty of interest. Another such example might be to complete a program in pediatrics as the broad foundation with subspecialty electives in oncology. Such programs would allow the advanced practice nurse to have a foundation with which to care for patients, to recognize a broad range of diseases and conditions, and to care for the whole patient. In addition, they would have educational preparation in a specific subspecialty giving them additional expertise in providing care to patients with those specific health care needs. It is possible that advanced educational programs would then have greater flexibility to explore the development of additional specialty electives for value-added educational experiences.

Comment: Limiting the number or titles recognized by the Board is the first step to a broader model of advanced practice nursing recognition and regulation. UTBON/NLCA/NCSBNAPRNTF

Response: The Board agrees the proposed rule may provide an initial step in moving from the 22 CNS and 19 NP titles it currently recognizes to broader recognition of just the NP and CNS titles. Based on discussions during a national meeting hosted by the

ANA on December 16, 2004, it appears that broader based legal recognition of just the NP and CNS titles holds the most support from the profession. The Board would likely support this model of regulation if it is demonstrated to be in the public interest.

Comment: The proposed rule will assure greater mobility for advanced practice nurses moving from one state to another because many jurisdictions do not recognize subspecialty titles. UTBON/NLCA/NCSBNAPRNTF, Individual comment

Response: The Board agrees with this comment. Board staff has had contact with individuals who were eligible for recognition in Texas with a subspecialty title but were not eligible to be recognized in other jurisdictions. APNs frequently do not appreciate the significant variation in regulation of advanced practice nurses from one jurisdiction to another. The proposed rule limits legal recognition of APN titles to those most recognized in other jurisdictions. For example, when staff queried other boards of nursing regarding the APN titles they recognized, only five responded that they recognize clinical nurse specialists in oncology nursing. Only two jurisdictions indicated that they recognized palliative care nurse practitioners. With a broad-based foundation in their advanced educational programs, these same APNs could possibly qualify as clinical nurse specialists or nurse practitioners in a broad specialty area with additional expertise in their respective subspecialty areas of oncology or palliative care.

It is also important to consider that APNs who are recognized in narrow subspecialties can and do experience difficulty finding employment even when staying within Texas (for example, the aforementioned CNS in neonatal nursing). Staff is repeatedly asked if the Board grants exemptions from the practice requirement for maintenance of APN recognition when the individual APN cannot find employment in his/her area of recognition. Likewise, the Board has taken disciplinary action in cases in which the APN accepted employment outside his/her specialty area or beyond his/her authorized scope of practice.

Comment: Advanced practice nurses who do not have a broad foundation before specializing (much like physicians do) risk failing to accurately diagnose and respond to co-morbid diseases and conditions. Individual comments

Response: The Board agrees with these comments. The Board does not wish to deprive the public of expert advanced practice nursing care in subspecialty areas; however, the Board recognizes that APNs must have a solid, broad-based foundation upon which to build their expertise in more narrow subspecialty areas in order to recognize a wide variety of co-morbidities that may be experienced by patients under their care. Additionally, advanced practice nurses that do not have a broad foundation upon which to build subspecialty expertise may fail to make appropriate referrals for patients to obtain needed health care services. The Board believes that the proposed rule seeks to continue to recognize those advanced practice roles and specialties that provide consistent education across a broad specialty area (such as family practice or adult health). The individual may then build upon this foundation with subspecialty expertise in order to better provide for the health care needs of the patient as a whole rather than providing for health care needs related to a particular subspecialty only.

In conclusion, the *Texas Register* requires that the Board take action on a proposed rule (either adoption or withdrawal) within six months of rule publication. Therefore, because the initially proposed amendments were published in August 2004, it was not possible to grant TNA's request for the six month moratorium for further discussion of this issue without taking action on the proposed amendments. In order to allow for the moratorium requested by TNA, the Board agrees to withdraw the amendments to the rules as proposed on August 13, 2004, in the *Texas Register* and respond to comments received. The initially proposed rule amendments were withdrawn effective January 27, 2005. In response to those comments, the Board has integrated some of the requested changes and re-proposed the rules using the language in the current proposed rule amendments. The proposed amended rule language does not change the titles previously proposed for continued recognition. It does, however, contain other substantive changes as recommended by the comments received.

Katherine Thomas, executive director, has determined that for the first five-year period the proposed amendments are in effect, fiscal implications may exist for state or local government because some of the government funded nursing education programs with advanced educational programs with subspecialty tracks may see a drop in enrollment. Advanced practice nursing students may not seek to enroll in those tracks due to the inability to obtain initial authorization to practice.

Katherine Thomas, executive director, has determined that for each year of the first five years the proposed amendments are in effect, the public benefit will be more consistency nationally in APN titles and that limiting the number of titles recognized by the Board provides assurance to the public that advanced practice nurses who are authorized to practice in Texas have completed broad-based educational preparation for entry into practice at the advanced level. They are prepared to recognize a wide range of diseases and conditions most commonly seen in their patient populations. Additionally, each of the advanced roles and specialties recommended for continued recognition have a national certification examination that is specifically targeted for the role and the specialty area that exists or is in development to be released later this year (acute care pediatric nurse practitioner). The time-limited exception provides a mechanism for those individuals whose titles have not been included in the list of recommended titles. Thus, programs and their students are given fair notice (three calendar years) of the change. Finally, the individual advanced practice nurse will benefit in that he/she could subspecialize without having to seek and maintain additional authorizations with the board. Employers of advanced practice nurses would also benefit in that they would not have to wait for board approval or certification in subspecialty areas. The effect on small businesses may be that some of the advanced educational programs who offer subspecialty tracks may see a drop in enrollment because individuals will not seek to enroll in those courses due to the inability to obtain initial authorization to practice. The board, however, is not recommending that existing courses disappear, but that the programs continue to offer these courses as electives or as post-master's options for those who wish to complete additional subspecialty courses. The anticipated cost to affected individuals as a result of these proposed amendments are that advanced practice nurses who are authorized in those specialties not on the list may be concerned that they are not eligible for continued authorization to practice and, therefore, not able to find suitable employment. Grandparenting will allow continued recognition for those who have already been approved in those advanced roles and specialty areas.

Written comments on the proposal may be submitted to Katherine A. Thomas, MN, RN, Executive Director, Board of Nurse Examiners, 333 Guadalupe, Suite 3-460, Austin, Texas, 78701.

The proposed amendments are pursuant to the authority of Texas Occupations Code §301.151 and §301.152 which authorizes the Board of Nurse Examiners to adopt, enforce, and repeal rules consistent with its legislative authority under the Nursing Practice Act.

The proposed amendments will affect the implementation of Texas Occupations Code §301.152.

§221.2. Authorization and Restrictions to Use of Advanced Practice Titles.

(a) Effective January 1, 2006, a registered nurse [~~Registered nurses~~] holding him or herself [~~themselves~~] out to be an advanced practice nurse shall be authorized to practice and hold a title in [~~nurses may include, but not be limited to,~~] the following categories [~~of advanced practice nurses~~]:

(1) nurse anesthetist;[~~,~~]

(2) nurse-midwife;[~~,~~]

(3) nurse practitioner in the following specialties:[~~,~~]

(A) Acute Care Adult;

(B) Acute Care Pediatric;

(C) Adult;

(D) Family;

(E) Gerontological;

(F) Neonatal;

(G) Pediatric;

(H) Psychiatric/Mental Health;

(I) Women's Health; and/or

(4) clinical nurse specialist in the following specialties:[~~,~~]

(A) Adult Health/Medical-Surgical Nursing;

(B) Community Health Nursing;

(C) Critical Care Nursing;

(D) Gerontological Nursing;

(E) Pediatric Nursing; and

(F) Psychiatric/ Mental Health Nursing.

(b) A registered nurse [~~Registered nurses~~] who holds [~~hold~~] current authorization to practice as an advanced practice nurse [~~nurses~~] issued by the board in any of the categories indicated in the previous subsection shall [~~may~~] use that [~~the~~] title when functioning in the advanced practice role. A registered nurse who was granted authorization to practice in an advanced role and specialty not indicated in the previous subsection prior to January 1, 2006, may continue to use the advanced practice title approved by the Board provided all requirements for maintenance of advanced practice authorization are met.[~~specified on that authorization.~~] "Advanced practice nurse" shall not be used as a title.

(c) Unless authorized as an advanced practice nurse by the board as provided for by §§221.4 - 221.8 [~~221.5-8~~] of this chapter (relating to Full Authorization; Provisional Authorization; Interim Approval; Petitions for Waiver; and Maintaining Active Authorization as an Advanced Practice Nurse), a registered nurse shall not:

(1) - (2) (No change.)

(d) (No change.)

§221.7. Petitions for Waiver and Exemptions.

(a) - (d) (No change.)

(e) Exemptions granting authorization to utilize titles not authorized by §221.2 of this chapter may be granted to qualified applicants who complete their advanced educational programs prior to January 1, 2010. Applicants must meet all other requirements as stated in §221.4 of this chapter.

(1) The following specialty titles may be considered for exemption if the individual is not qualified for authorization to utilize a title authorized by §221.2 of this chapter:

(A) Acute Care Clinical Nurse Specialist;

(B) Critical Care Nurse Practitioner;

(C) Cardiovascular Clinical Nurse Specialist;

(D) Emergency Nurse Practitioner or Clinical Nurse Specialist;

(E) Family Clinical Nurse Specialist;

(F) Home Health Clinical Nurse Specialist;

(G) Maternal (Parent)-Child Health Clinical Nurse Specialist (with or without subspecialization);

(H) Neonatal Clinical Nurse Specialist;

(I) Oncology Nurse Practitioner or Clinical Nurse Specialist;

(J) Pediatric Critical Care Nurse Practitioner;

(K) Perinatal Nurse Practitioner or Clinical Nurse Specialist;

(L) School Nurse Practitioner; and

(M) Women's Health Clinical Nurse Specialist.

(2) Those individuals authorized on the basis of this exemption shall be limited to providing advanced practice nursing care within the geographical boundaries of the State of Texas. This shall not prevent the individual from utilizing Nurse Licensure Compact privileges to function as a registered nurse.

(3) The applicant must submit all required documentation necessary to demonstrate that all requirements for authorization to practice have been met.

(4) The applicant must submit a written request for exemption to §221.2 of this chapter and indicate the desired title.

(5) Interim, provisional, or full authorization may be granted to qualified applicants.

(6) Advanced practice nurses authorized to practice on the basis of this exemption shall use the advanced practice title specified on the authorization to practice document provided by the board.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 27, 2005.

TRD-200500377

Katherine Thomas
Executive Director
Board of Nurse Examiners
Earliest possible date of adoption: March 13, 2005
For further information, please call: (512) 305-6823

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PART 12. BOARD OF VOCATIONAL NURSE EXAMINERS

CHAPTER 237. CONTINUING EDUCATION

SUBCHAPTER A. DEFINITIONS

22 TAC §237.1

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Board of Nurse Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Board of Nurse Examiners proposes the repeal of 22 Texas Administrative Code Chapter 237, concerning Continuing Education, and specifically Subchapter A (Definitions), §237.1. The other subchapter in this chapter is being proposed for repeal concurrently with this subchapter. Effective February 1, 2004, the Board of Nurse Examiners and the Board of Vocational Nurse Examiners were merged into one agency, the Board of Nurse Examiners. The Board of Vocational Nurse Examiners ceased to exist as an agency. House Bill 1483, passed by the 78th Regular Legislative Session, was the legislative action that implemented the consolidation. The repeal implements House Bill 1483 and the make-up and function of the new Board of Nurse Examiners. Concurrent with the proposed repeal are proposed amendments to Chapter 216 (Continuing Education) which will subsequently be applicable to all nurses. This repeal is for the purpose of preventing conflicting rules and consolidating the rules applicable to all nurses under Part 11 (Board of Nurse Examiners) of the Texas Administrative Code.

Katherine Thomas, Executive Director, has determined that for the first five-year period the proposed repeal is in effect there will be no fiscal implications for state or local government as a result of implementing the proposed repeal.

Ms. Thomas has also determined that for each year of the first five years the proposed repeal is in effect, the public benefit will be that the coinciding proposed amendments will safeguard the welfare of the public of this State through implementation of continuing education standards that provide assurance that the vocational nurse is a safe practitioner. The proposed repeal will also prevent conflicting rules. There is no known effect on small businesses and no anticipated cost to affected individuals as a result of this proposed repeal.

Written comments on the proposal may be submitted to Katherine A. Thomas, MN, RN, Executive Director, Board of Nurse Examiners, 333 Guadalupe, Suite 3-460, Austin, Texas 78701.

The repeal is proposed pursuant to the authority of Texas Occupations Code §301.151 and §301.152 which authorizes the Board of Nurse Examiners to adopt, enforce, and repeal rules consistent with its legislative authority under the Nursing Practice Act.

The proposed repeal implements Texas Occupations Code §§301.303 - 301.305.

§237.1. Definitions.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 24, 2005.

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Katherine Thomas
Executive Director
Board of Nurse Examiners
Earliest possible date of adoption: March 13, 2005
For further information, please call: (512) 305-6823

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SUBCHAPTER B. CONTINUING EDUCATION

22 TAC §§237.11 - 237.23

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Board of Nurse Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Board of Nurse Examiners proposes the repeal of 22 Texas Administrative Code Chapter 237, concerning Continuing Education, and specifically Subchapter B (Continuing Education), §§237.11 - 237.23. The other subchapter in this chapter is being proposed for repeal concurrently with this subchapter. Effective February 1, 2004, the Board of Nurse Examiners and the Board of Vocational Nurse Examiners were merged into one agency, the Board of Nurse Examiners. The Board of Vocational Nurse Examiners ceased to exist as an agency. House Bill 1483, passed by the 78th Regular Legislative Session, was the legislative action that implemented the consolidation. The repeal implements House Bill 1483 and the make-up and function of the new Board of Nurse Examiners. Concurrent with the proposed repeal is proposed amendments to Chapter 216 (Continuing Education) which will subsequently be applicable to all nurses. This repeal is for the purpose of preventing conflicting rules and consolidating the rules applicable to all nurses under Part 11 (Board of Nurse Examiners) of the Texas Administrative Code.

Katherine Thomas, Executive Director, has determined that for the first five-year period the proposed repeal is in effect there will be no fiscal implications for state or local government as a result of implementing the proposed repeal.

Ms. Thomas has also determined that for each year of the first five years the proposed repeal is in effect, the public benefit will be that the coinciding proposed amendments will safeguard the welfare of the public of this State through implementation of continuing education standards that provide assurance that the vocational nurse is a safe practitioner. The proposed repeal will also prevent conflicting rules. There is no known effect on small businesses and no anticipated cost to affected individuals as a result of this proposed repeal.

Written comments on the proposal may be submitted to Katherine A. Thomas, MN, RN, Executive Director, Board of Nurse Examiners, 333 Guadalupe, Suite 3-460, Austin, Texas 78701.

The repeal is proposed pursuant to the authority of Texas Occupations Code §301.151 and §301.152 which authorizes the Board of Nurse Examiners to adopt, enforce, and repeal rules

consistent with its legislative authority under the Nursing Practice Act.

The adoption of the proposed repeal will implement Texas Occupations Code §§301.303 - 301.305.

§237.11. Purpose.

§237.12. Authority.

§237.13. Philosophy.

§237.14. Requirements.

§237.15. Criteria for Acceptable Continuing Education Activity.

§237.16. Additional Criteria for Specific Continuing Education Programs.

§237.17. Activities Which Are Not Acceptable as Continuing Education.

§237.18. Responsibilities of the Individual Licensee.

§237.19. Relicensure Process.

§237.20. Audit.

§237.21. Appeals.

§237.22. Exemptions, Waivers, and Exclusions.

§237.23. Consequences of Noncompliance.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 24, 2005.

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Katherine Thomas
Executive Director
Board of Nurse Examiners
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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER F. MOTOR VEHICLE SALES TAX

34 TAC §3.74

The Comptroller of Public Accounts proposes an amendment to §3.74, concerning seller responsibility. This amendment implements House Bill 2424, 78th Legislature, 2003. This legislation added Tax Code §152.106 providing for the prohibition of certain advertising and penalties. A new subsection (h) is added to address the change.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the rule would benefit the public by prohibiting dealers from making certain advertising claims that might confuse the public with regard to their tax responsibilities on the purchase of a motor vehicle . This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This section is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

This amended section implements Tax Code, §152.106.

§3.74. Seller Responsibility

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Date of sale--The day the motor vehicle is delivered to the purchaser unless otherwise specified by written agreement.

(2) Dealer--A person who holds a license issued pursuant to [~~the~~]Transportation Code, Chapter 503. The term includes a dealer authorized by law and by franchise agreement to offer for sale a new motor vehicle. The term also includes an independent dealer authorized by law to offer for sale a motor vehicle other than a new motor vehicle.

(3) New motor vehicle--A motor vehicle that, without regard to mileage, has not been the subject of a retail sale.

(4) Retail sale--A sale of a motor vehicle other than:

(A) a sale of a new motor vehicle in which the purchaser is a franchised dealer who is authorized by law and by franchise agreement to offer the vehicle for sale as a new motor vehicle and who acquires the vehicle to sell in a manner provided by law or for purposes allowed under [~~the~~]Transportation Code, Chapter 503;

(B) a sale of a vehicle other than a new motor vehicle in which the purchaser is a dealer who holds a dealer's license issued under [~~the~~]Transportation Code, Chapter 503, and who acquires the vehicle either for the exclusive purpose of resale in the manner provided by law or for purposes allowed under [~~the~~]Transportation Code, Chapter 503; or

(C) a sale to a franchised dealer of a new motor vehicle removed from the franchised dealer's inventory for the purpose of entering into a contract to lease the vehicle to another person if, immediately after executing the lease contract, the franchised dealer transfers title of the vehicle and assigns the lease contract to the lessor of the vehicle.

(5) Seller-financed sale--A retail sale of a motor vehicle by a dealer in which the selling dealer collects all or part of the total consideration in periodic payments and retains a lien on the motor vehicle until all payments have been received. The term does not include a:

(A) retail sale of a motor vehicle in which a person other than the seller provides the consideration for the sale and retains a lien on the motor vehicle as collateral;

(B) lease; or

(C) rental.

(6) Total consideration--The amount paid or to be paid for a motor vehicle and its accessories attached on or before the sale. The term does not include separately stated finance or interest charges on credit extended under a conditional sale or other deferred payment contract, or the value of a motor vehicle taken by a seller as all or a part of the consideration for sale of another motor vehicle.

(b) Tax permit. Every dealer making seller-financed sales must apply to the comptroller for a tax permit. Each entity (corporation, partnership, sole proprietor, etc.) must apply for its own permit. The permit application will be furnished by the comptroller. The permit cannot be transferred from one owner to another.

(c) Collection of the tax.

(1) Seller-financed sales. The selling dealer must collect tax on the total consideration paid as the payments are received. The tax is a debt of the purchaser to the seller until paid. The total downpayment is subject to tax unless the payment is itemized to indicate nontaxable charges. If the finance agreement bears interest, it is conclusively presumed that interest accrues and is paid by the purchaser on a straight line basis.

(2) Retail sales other than seller-financed sales. Unless the sale is exempt, the selling dealer must collect the tax on the total consideration paid for the motor vehicle. The tax is a debt of the purchaser to the seller until paid. This section does not apply to the sale of a motor vehicle with a gross weight in excess of 11,000 pounds; however, the seller must provide the purchaser with a completed tax statement and all other documents necessary to title and register the motor vehicle.

(d) Remittance of the tax.

(1) Seller-financed sales.

(A) Each selling dealer must remit the tax due to the comptroller as the payments are received. On or before the 20th day of the month following each reporting period, each selling dealer shall file a consolidated return with the comptroller, together with the tax payment for all locations operated by the entity.

(B) The returns must be signed by the person required to file the report or by the person's duly authorized agent.

(C) The returns will be filed on forms prescribed by the comptroller. The fact that the dealer does not receive the form or does not receive the correct forms from the comptroller for the filing of the return does not relieve the selling dealer of the responsibility of filing a return and payment.

(D) The return should be completed attributing the receipts to the county in which the dealer applied for a motor vehicle certificate of title.

(E) Selling dealers owing tax of less than $1,500 per quarter may file returns quarterly. The quarterly reporting periods end on March 31st, June 30th, September 30th, and December 31st.

(F) Selling dealers owing $1,500 or more in tax per quarter must file monthly returns unless a seller prepays the tax.

(G) Discounts and prepaying the tax.

(i) Each dealer may retain 0.5% of the amount of tax due as reimbursement for the expense of collecting the tax.

(ii) A dealer who makes a prepayment based upon an estimate of tax liability may retain an additional 1.25% of the amount due. The prepayment must be made on or before the 15th day of the second month of the quarter for which the tax is due. Monthly prepayments are due on or before the 15th day of the month and are also entitled to the additional 1.25% deduction.

(iii) On or before the 20th day of the month following the quarter or month for which a prepayment was made, the dealer must file a return showing the actual liability and remit any amount due in excess of the prepayment. If there is an additional amount due, the dealer may retain the 0.5% reimbursement provided that both the return and the additional amount due are timely filed. If the prepayment exceeded the actual liability, the selling dealer will be mailed an overpayment notice or refund warrant.

(iv) If a dealer does not file a quarterly or monthly return together with payment on or before the due date, the dealer forfeits all discounts and incurs a mandatory 5.0% penalty. After the first 30 days delinquency, an additional mandatory penalty of 5.0% is assessed against the selling dealer. After the first 60 days delinquency, interest begins to accrue at the prime rate plus 1.0% as published in the *Wall Street Journal* on the first business day of each calendar year. For taxes due on or before December 31, 1999, interest is assessed at the rate of 12% annually.

(2) Retail sales other than seller-financed sales.

(A) Except for sales of motor vehicles with a gross weight in excess of 11,000 pounds and for sales of motor vehicles that fall within subparagraph (B) of this paragraph, the selling dealer must remit the tax, along with the properly completed tax statement, to the county tax assessor- collector by the 20th working day following the date of sale.

(B) If a dealer sells a commercial motor vehicle that is required to be equipped with a body or other necessary equipment before the motor vehicle can be registered under the Transportation Code, then the selling dealer must remit the tax, along with the properly completed tax statement, to the county tax assessor-collector by the 20th working day following the date on which the motor vehicle becomes eligible for registration.

(C) Documentation must be retained to indicate that the proper amount of tax was submitted to the county tax assessor-collector. A copy of the receipt for taxes issued by the county tax assessor-collector will satisfy this requirement.

(e) General principles of seller-financed sales.

(1) A transaction is considered paid in full when the purchaser of the motor vehicle provides that motor vehicle to the seller as consideration for the purchase of another motor vehicle from the same seller. The remainder of any tax owed on the initial sale must be reported in the report period in which the motor vehicle is traded in.

(2) Tax remitted to the county tax assessor-collector at the time of registration and title transfer will be considered to be intended to satisfy the tax liability for that transaction and no refund will be available if the purchaser fails to satisfy his total liability to the dealer.

(3) If the selling dealer fails to apply for certificate of title and registration within 60 days of the date of sale, the seller becomes liable for all unremitted tax on the total consideration and must remit that amount on the first return due after the expiration of the 60 days.

(4) If the selling dealer transfers the right to receive payments on a sale, the dealer is liable for the unpaid tax due on the total consideration and must report and remit that amount in the report for the period in which the transfer of the right to receive payments is made. The dealer may not take a deduction in the amount of tax due even if the dealer sells the right to receive payments at a discount. The right to receive payments is transferred and the tax remittance accelerated regardless of recourse to the seller or any other condition.

(5) If the selling dealer remits the unpaid tax due in accordance with paragraph (4) of this subsection, and the motor vehicle purchaser fails to make payments to the dealer's transferee or assignee, then no bad debt deduction for any amount that the transferee or assignee determines to be uncollectible on the purchaser's account may be taken against any motor vehicle sales tax that the transferee or assignee may owe.

(f) Resale certificates and exemption documentation.

(1) A seller may accept a motor vehicle resale certificate only from a dealer as defined in this section. A resale certificate for the sale of a new motor vehicle purchased for resale may only be accepted from a franchised dealer who is authorized by law and by franchise agreement to offer the vehicle for sale as a new motor vehicle. To be valid, the motor vehicle resale certificate must show the dealer license issued pursuant to [~~the~~]Transportation Code, Chapter 503. See §3.95 of this title (relating to Motor Vehicle Sales Tax Resale Certificate; Sales for Resale).

(2) A seller may accept a properly completed Texas Motor Vehicle Sales Tax Exemption Certificate--For Vehicles Taken Out of State, in lieu of collecting tax on motor vehicles that will be removed from this state without being operated other than to remove the motor vehicle from this state. See §3.90 of this title (relating to Motor Vehicles Purchased for Use Outside of Texas).

(3) Exemptions provided for in the Tax Code, Chapter 152, Subchapter E, other than those discussed in paragraphs (1) and (2) of this subsection, shall be indicated on the tax statement provided to the county tax assessor-collector at the time of title application.

(g) Unremitted tax paid to seller, transfer of certificate of title.

(1) A county tax assessor-collector may accept an application for certificate of title without the payment of tax from a purchaser who paid the tax as described in subsection (c) of this section to a seller who failed to remit the tax as described in subsection (d) of this section.

(2) The purchaser must present acceptable evidence of tax payment at the time of title application. Acceptable evidence includes, but is not limited to, a sales contract or bill of sale that identifies the amount of tax paid.

(3) The application for certificate of title and receipt should indicate "tax paid to seller," a zero in the space labeled amount of tax due, and the seller's motor vehicle seller-finance tax permit number (if appropriate and available).

(4) The county tax assessor-collector shall notify the comptroller of the seller's failure to remit the tax through the automated Registration-Title System (RTS) and include the document indicating tax paid to the selling dealer in the title application material.

(h) Prohibited advertising. A dealer may not directly or indirectly advertise, hold out or state to a customer or the public that he will assume, absorb or refund a part of the tax imposed on the sale of a motor vehicle, or will not add tax to the sales price.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 26, 2005.

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Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: March 13, 2005
For further information, please call: (512) 475-0387

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 6. TEXAS DEPARTMENT OF CRIMINAL JUSTICE

CHAPTER 163. COMMUNITY JUSTICE ASSISTANCE DIVISION STANDARDS

37 TAC §163.40

The Texas Board of Criminal Justice proposes to amend §163.40, concerning Substance Abuse Treatment. The purpose of the amendments is to implement the legislative mandate in H.B. 2668 (78th Legislature, R.S.) for best practices targeting the substance abuse offender population under community supervision. The Substance Abuse Treatment Standards, as amended, will emphasize enhancement of cognitive programs targeting anti-social thinking and more intensive supervision for high-risk offenders. Community supervision and corrections departments (CSCDs) are already required to utilize valid assessments to assure proper levels of supervision and program placements. Treatment providers will continue to be evaluated to determine outcomes and impact on participants. However, the revised Standards are not more intrusive than the current Department of State Health Services (formerly Texas Commission on Alcohol and Drug Abuse) rules under which treatment providers are currently operating.

Significant amendments are summarized as follows. Definitions were added in subsection (a) to include the terms "Best Practices," "Criminogenic Risks/Needs," "Life Skills Training," "Responsivity," and "Treatment Team," among others. Program time frames have been amended to better correspond to the current Department of State Health Services (formerly Texas Commission on Alcohol and Drug Abuse Commission) rules. Subsection (d) is amended to provide that offenders who are removed from treatment as "ineligible" are not to be counted as "discharged." In subsection (e), the intake process is required to include eligibility, and to be completed within ten working days. Subsection (g), dealing with assessments, is amended to require responsivity analysis. Treatment planning is required to include criteria for discharge based on achievement of treatment plan goals, in subsection (m), and in subsection (o) is a similar requirement for changes in treatment stages; amended subsection (o) also requires that the treatment team meet if the offender is subject to a major setback, and prior to discharge. New subsection (r) requires a discharge summary for all offenders who do not leave the program successfully, while amended subsection (q) requires a discharge plan for those who leave successfully. Subsection (s) limits the number of offenders in group counseling, life skills, and group education classes; provides credentialing requirements for such services; requires a counselor on duty during normal business hours; and requires CSCDs to incorporate certain components of "best practices" in treatment programs. Subsection (u) is amended to delete references to the detoxification stage of treatment, as CSCDs do not offer this

stage of treatment. In subsection (w), caseloads for Supportive Residential Treatment are permitted to increase from 16 to 20 offenders per counselor, with further increases permissible based on research-based evidence.

Brad Livingston, Executive Director for TDCJ, has determined that for the first five years, the legislation upon which the rule is based will have fiscal implications for CSCDs, consistent with the Legislative Budget Board's Fiscal note for H.B. 2668. That document indicated that local governments would incur additional costs because additional persons would be diverted to community supervision from the Texas Department of Criminal Justice, but did not quantify those costs, or quantify the costs, if any, of the implementation of "Best Practices." Mr. Livingston is not able to predict or quantify whether the various amendments would have a positive or negative fiscal impact, in part because any impact would depend on each individual CSCD's current level of service. The proposed amendments were conveyed to all CSCDs on October 4, 2004, with a request for comments by October 25, 2004, and the proposed amendments were revised in light of CSCD comments.

Mr. Livingston also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be to enhance and assist in the targeting of appropriate strategies for the supervision and treatment of substance abusing offenders. Evidence-Based Practices have a strong emphasis on outcome measures, specifically reduction in recidivism. These practices have been proven through research to be effective, allowing the use of scarce resources more effectively and to target the appropriate offenders for each program. Mr. Livingston has determined that there will be no economic costs to persons who are required to comply with the section as amended, and that there will be no fiscal impact on small businesses.

Questions about the content of the proposal may be directed to John Hill at (512) 305-9327 in the TDCJ Community Justice Assistance Division. Written comments should be directed to Carl Reynolds, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711, or to Carl.Reynolds@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposal in the *Texas Register*.

The amendments are proposed under Texas Government Code, §509.015.

Cross Reference to Statutes: Texas Government Code, §509.015.

§163.40. Substance Abuse Treatment.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Admission--The administrative process and procedure performed to accept an offender into a treatment program or facility.

(2) Aftercare--Counseling and community based support services that are designed to provide continued support for treatment delivered in a residential or outpatient program [~~Assessment--a process using a structured or semi-structured interview to determine the nature and extent of a client's chemical dependency.~~]

(3) Aftercare Caseloads--Supervision and support services for offenders who have completed a substance abuse treatment program. [~~Chemical Dependency Counselor--A qualified, credentialed counselor intern working under a direct supervision.~~]

(4) Assessment--A process conducted by a qualified credential counselor (QCC) trained to administer a structured interview to determine the nature and extent of an offender's chemical abuse, dependency or addiction, to assist in making an appropriate referral. Other criminogenic risks/needs will be assessed and incorporated into the individual treatment plan. [~~Continuum of Care--A system which provides for the uninterrupted provision of essential services to offenders entering, exiting, and within the system.~~]

(5) Best Practices--In these standards, Best Practices are evidence-based substance abuse treatment programs that address concepts such as criminogenic risks/needs, responsivity, and cognitive-behavioral treatment, and programs that possess the following hallmarks: [~~Counseling--Face-to-face interactions between offenders and counselors to help offenders identify, understand, and resolve their personal issues and problems related to their substance abuse or chemical dependency. Counseling may take place in groups or in individual meetings.~~]

(A) validated treatment assessments that include criminogenic risks/need factors;

(B) a treatment regimen that focuses on changing criminogenic risks/needs, behaviors, and thinking patterns;

(C) a treatment regimen that includes a specific, cognitive-behavioral program that has been recognized in professional criminal justice journals;

(D) responsivity in addressing offenders' needs and employment of qualified staff; and

(E) measurable outcomes to reduce substance abuse, dependency or addiction and other criminogenic risks/needs.

(6) Chemical Dependency--Substance-related disorders as that term is used in the most recent published edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM). [~~Counselor Intern--A person pursuing a course of training in chemical dependency counseling at a regionally accredited institution of higher education or a registered clinical training institution who has been designated as a counselor. The activities of a counselor intern shall be performed under the direct supervision of a qualified, credentialed counselor in accordance with rules adopted by the Texas Commission on Alcohol and Drug Abuse.~~]

(7) Continuum of Care--A system that provides for the uninterrupted provision of essential services from initial assessment through completion of treatment. [~~Detoxification--Chemical dependency treatment designed to systematically reduce the amount of alcohol and other toxic chemicals in an offender's body, manage withdrawal symptoms, and encourage the offender to continue ongoing treatment for chemical dependency.~~]

(8) Counseling--Face-to-face interactions between offenders and counselors to help offenders identify, understand, and resolve their personal issues and problems related to their substance abuse or chemical dependency. Counseling may take place in groups or in individual meetings. [~~Direct Care Staff--The staff responsible for providing treatment, care, supervision, or other offender services that involve a significant amount of direct contact. (Clerical support staff are not considered direct care staff.)~~]

(9) Counselor--A qualified credentialed counselor, graduate or counselor intern working towards licensure that would qualify them to be a qualified credentialed counselor (QCC). [~~Discharge--The time when an offender leaves a program or facility and will no longer be receiving chemical dependency treatment from that program or facility.~~]

(10) Counselor Intern--An advanced student or graduate in a professional field gaining supervised professional experience. [~~Discharge Summary--A recapitulation of the offender's progress and participation while in either primary, residential, or outpatient treatment.~~]

(11) Criminogenic Risk/Needs--Dynamic risk factors that are directly related to crime production, such as antisocial peers; antisocial beliefs, values and attitudes; substance abuse, dependency or addiction; anger/hostility; poor self-management skills; inadequate social skills; poor attitude toward work/school; and poor family dynamics. [~~Education--Educational instruction; a planned, structured presentation of information which is related to substance abuse or chemical dependency.~~]

(12) Detoxification--Chemical dependency treatment designed to systematically reduce the amount of alcohol and other toxic chemicals in an offender's body, manage withdrawal symptoms, and encourage the offender to continue ongoing treatment for chemical dependency. [~~Emergency--A situation requiring immediate attention and action to treat or prevent physical, emotional, or mental threat, harm, injury, or illness.~~]

(13) Direct Care Staff--Staff responsible for providing treatment, care, supervision, or other direct client services that involve face-to-face contact with an offender. [~~Facility--The physical location of the treatment program operated by, for, or with funding from the TDCJ-CJAD. Some locations may be locked facilities for in-patient treatment; other programs may be offered at locations as outpatient treatment.~~]

(14) Discharge--Formal, documented termination of services. [~~Grievance--A formal complaint limited to matters affecting the complaining offender personally and limited to matters for which the facility/program has the authority to remedy through the grievance process.~~]

(15) Discharge Summary--A written report of the offender's progress and participation while in treatment, including a discharge plan that provides an aftercare/supervision plan designed to sustain progress for offenders successfully completing treatment. [~~Primary Counselor--An individual working directly with and being responsible for the treatment of the offender.~~]

(16) Education--Educational instruction; a planned, structured presentation of information which is related to substance abuse or chemical dependency. Education is not considered counseling. [~~Qualified, Credentialed Counselor (QCC)--A licensed chemical dependency counselor (LCDC) or one of the following professionals:~~]

~~[(A) licensed professional counselor (LPC);]~~

~~[(B) licensed master social worker (LMSW);]~~

~~[(C) licensed marriage and family therapist (LMFT);]~~

~~[(D) licensed psychologist;]~~

~~[(E) licensed physician (MD or DO);]~~

~~[(F) certified addictions registered nurse (CARN);]~~

~~[(G) licensed psychological associate; and]~~

~~[(H) advance practice nurse recognized by the Board of Nurse Examiners as a clinical nurse specialist or nurse practitioner with specialty in psyche-mental health (APN-P/MH).]~~

(17) Emergency--A situation requiring immediate attention and action to treat or prevent physical or emotional harm or illness. [~~Screening Instrument--a written device administered to an offender to determine the possible existence of chemical dependency.~~]

(18) Evaluation--A process conducted by a CSO trained to administer the TDCJ-CJAD Substance Abuse Evaluation (SAE) instrument to determine the nature and extent of an offender's chemical abuse, dependency or addiction to assist in making an appropriate referral. Other criminogenic risk/needs will be assessed and incorporated into the individual treatment plan. [~~Senior Counselor/Unit Manager/Unit Supervisor--A supervisory staff member who directs, monitors, and oversees the work performance of subordinate staff members.~~]

(19) Facility--The physical location of the treatment program operated by, for, or with funding from the TDCJ-CJAD. Some locations may be secured facilities for in-patient treatment; other programs may be offered at locations as outpatient treatment. [~~Special Needs Populations--Offenders who have significant problems in the areas of mental health, diminished intellectual capacity, or medical needs.~~]

(20) Graduate--A counselor intern who has successfully completed education and work experience requirements prior to licensure by the Texas Department of State Health Services (formerly Texas Commission on Alcohol and Drug Abuse). [~~Treatment--A planned, structured, and organized program designed to initiate and promote a person's chemical-free status or to maintain the person free of illegal drugs. It includes, but is not limited to, the application of planned procedures to identify and change patterns of behavior related to or resulting from chemical dependency that are maladaptive, destructive, or injurious to health, or to restore appropriate levels of physical, psychological, or social functioning lost due to chemical dependency.~~]

(21) Grievance--A formal complaint limited to matters affecting the complaining offender personally and limited to matters that the facility/program has the authority to remedy. [~~Use of Force--Graduated levels of use of physical strength or weapons necessary to gain physical compliance and control of an offender whose actions otherwise pose a danger to self or others.~~]

(22) Intake--The process of gathering information to determine if an offender is eligible and appropriate for services, and providing information to the offender about a program's services and rules.

(23) Life Skills Training--A structured program of training, based upon a written curriculum and provided by qualified staff designed to help offenders with social competencies, such as communication and social interaction, stress management, problem solving, decision making, and management of daily responsibilities.

(24) Primary Counselor--An individual working directly with and being responsible for the treatment of the offender.

(25) Qualified, Credentialed Counselor (QCC)--A licensed chemical dependency counselor (LCDC) or one of the following professionals:

(A) licensed professional counselor (LPC);

(B) licensed master social worker (LMSW);

(C) licensed marriage and family therapist (LMFT);

(D) licensed psychologist;

(E) licensed physician (MD or DO);

(F) licensed physician's assistant;

(G) certified addictions registered nurse (CARN); or

(H) licensed psychological associate; and

(I) nurse practitioner recognized by the Board of Nurse Examiners as a clinical nurse specialist or nurse practitioner with specialty in psyche-mental health (APN-P/MH).

(26) Responsivity--Matching the characteristics of the offender with the program modality, and the knowledge, skills, and abilities of the staff. It includes offender's learning style and readiness for treatment; the quality of the treatment relationship; and the staff's therapeutic approach, cultural competency, use of reinforcement, and modeling.

(27) Screening--The initial stage of a process in which it is determined if an offender has a chemical dependency problem that may require further assessment or evaluation.

(28) Senior Counselor/Unit Manager/Unit Supervisor--A supervisory staff member who directs, monitors, and oversees the work performance of subordinate staff members.

(29) Special Needs Populations--Offenders who have significant problems in the areas of mental health, diminished intellectual capacity, or medical needs.

(30) Structured Activity--A planned, interactive, scheduled event that is overseen by staff in which participants actively take part in an activity related to recovery, health, life skills, or interpersonal skills.

(31) Treatment--A planned, structured, and organized program, either residential or non-residential, designed to initiate and promote an offender's chemical-free status or to maintain the offender free of illegal drugs. It includes, but is not limited to, the application of planned procedures to identify and change patterns of behavior related to or resulting from chemical dependency that are maladaptive, destructive, or injurious to health, or to restore appropriate levels of physical, psychological, or social functioning lost due to chemical dependency.

(32) Treatment Team--The treatment team shall consist of at least the offender, the offender's counselor, a CSO and/or residential CSO (when appropriate).

(b) Compliance. Compliance with TDCJ-CJAD substance abuse treatment standards is required of all programs that provide substance abuse treatment and are funded directly or indirectly or managed by TDCJ-CJAD. Programs and facilities providing only substance abuse education are not subject to these standards.

(c) Personnel & Staff Development/Accreditation. The employer shall ensure that employees acquire and maintain any credentials, licensing, certifications, or continuing education required to perform their duties, with copies kept in their personnel files. [~~Personnel files for employees shall be maintained to display copies of required documents. Programs that are not clinical training institutions as defined by the Texas Commission on Alcohol and Drug Abuse must inform all non-credentialed staff of this fact~~]

(d) Admissions and Removals. [~~There shall be documentation of specific admission criteria and procedures. Offenders are eligible for substance abuse treatment programs:~~]

(1) Eligibility--Programs shall have written eligibility criteria specific to the services and mission of the program. Offenders may be admitted into a program only by order of the court and only if they meet the minimum eligibility criteria as outlined in the program policies, licensure or CJAD approved program design. Offenders found to be ineligible for admission within 10 days of arrival at the program shall not be counted in program admissions. [~~if the offender's needs are met by the treatment services provided by the program,~~]

(2) There shall be documentation of specific admission criteria and procedures. Offenders are eligible for substance abuse treatment programs if: [~~if a court orders the offender into the program and the subsequent assessment indicates the need for treatment services; or~~]

(A) there is responsivity between the treatment services provided by the program and the offender's criminogenic risks/needs;

(B) a court orders the offender into the program and the subsequent assessment indicates the need for treatment services; or

(C) the program allows readmissions and the offender meets the admission criteria.

(3) For offenders who are placed in treatment programs who do not meet admission or eligibility criteria, a mechanism or procedure shall be developed for offender removal. A review and justification explaining the reason the offender does not meet admission criteria shall be required with copies kept in the offender's file. Offenders who do not meet eligibility criteria will be considered ineligible and shall not be counted as "discharged." [~~if the program allows readmissions and the offender meets the admission criteria. For offenders who are placed in treatment programs who do not meet admission criteria, a mechanism or procedure shall be developed for offender removal. A review and justification explaining the reason the offender does not meet admission criteria shall be required.~~]

(e) Intake. There shall be written policies and procedures establishing an intake process to determine eligibility for offenders entering a substance abuse treatment program. The intake process must be completed within ten working days of an offender's arrival in a program.

(f) Initial Assessment Procedures. Acceptable and recognized assessment tools [~~(tests and measurements)~~] shall be used in all substance abuse treatment programs within ten (10) working days from date of admission. Assessment policies and procedures shall require the use of approved clinical measurements and screening tests. If the screening identifies a potential mental health problem, the facility shall obtain a mental health assessment and seek appropriate mental health services when resources for mental health assessments and services are available internally or through referral at no additional cost to the program. Assessment procedures shall include the following:

(1) identification of strengths, abilities, needs and substance preferences of the offender [~~offenders served~~];

(2) summarization and evaluation of each offender to develop individual treatment plans;

(3) assessments completed by a [~~Qualified Credentialed Counselor (~~]QCC[~~)~~], or if the assessor is a Counselor Intern, then the documentation must be reviewed and signed by a QCC.

(g) Assessments. The assessment shall include:

(1) a summary of the offender's alcohol or drug abuse history including substances used, date of last use, date of first use, patterns and consequences of use, types of and responses to previous treatment, and periods of sobriety;

(2) family information, including substance use and abuse by family members and supportive or dysfunctional relationships;

(3) vocational and employment status, including skills or trades learned, work record, and current vocational plans;

(4) health information, including medical conditions that present a problem or that might interfere with treatment;

(5) emotional or behavioral problems, including a history of psychiatric treatment;

(6) educational achievement level;

(7) intellectual functioning level; [and]

(8) responsivity analysis; and [a diagnostic summary signed and dated by a Qualified Credentialed Counselor (QCC).]

(9) a diagnostic summary signed and dated by a QCC.

(h) Orientation. Each program shall establish written policies and procedures for the orientation process. Orientation shall be provided at the onset of treatment and in accordance with the level of treatment to be provided. The orientation shall relay information concerning program rules, the grievance procedure, and the steps necessary for offenders to complete treatment successfully.

(i) Offender Rights. The offender's basic rights shall be respected and protected, free from abuse, neglect, exploitation, and discrimination. Each provider shall have written policy and procedure to ensure protection of the offender's rights according to federal and state guidelines.

(j) Release of Information. There shall be written policies and procedures for protecting and releasing offender information that conforms to federal and state confidentiality laws. The staff shall follow written policies and procedures for responding to oral and written requests for offender-identifying information.

(k) Offender Records. There shall be written policies and procedures regarding the content of offender treatment records. Residential programs shall maintain separate individual treatment records for defendants. Case records, whether residential or outpatient, shall include the following information at a minimum:

(1) court order placing the offender into the program; [initial intake information form;]

(2) initial intake information form; [referral documentation;]

(3) referral documentation;[case information from referral source, if applicable;]

(4) case information from referral source, if applicable; [release of information forms;]

(5) release of information forms;[relevant medical information;]

(6) relevant medical information;[case history and assessment including risk and needs assessment and Strategies for Case Supervision if required;]

(7) case history and assessment including risk and needs assessment and Strategies for Case Supervision if required;[individual treatment plan;]

(8) individual treatment plan;[evaluation and progress reports;]

(9) evaluation and progress reports; and [discharge summary; and

(10) discharge summary. [court order placing the offender into the program.]

(l) Offender Records Review Policy. There shall be written policies [policy] and procedures to govern the access of offenders to their own substance abuse treatment records in accordance with Texas Health & Safety Code and 42 CFR part 2 (Code of Federal Regulations). This access does not apply to criminal justice records. Restrictions to access [to] treatment records shall be specified and explained to offenders upon request. Exceptions must involve the potential for harm to the offender or others.

(m) Treatment Planning and Review. Initial individual Treatment Plans will be completed by the counselor collaborating with the offender within ten [(10)] working days from the date of an offender's admission to a Community Corrections Facility (CCF), County Correctional Center (CCC) or any other substance abuse treatment program or through a similar process approved by the Community Supervision and Corrections Department (CSCD). Substance abuse treatment shall be based on substance abuse, chemical dependency or addiction and other criminogenic risks/needs identified through assessments and revised according to the offender's successful resolution of those substance abuse, chemical dependency or addiction and other criminogenic risks/needs [success or lack of progress].[,] Treatment plans shall include criteria for discharge that are based on the achievement of treatment plan goals and shall be reviewed at timely intervals with [at] a minimum of once each month or when major changes occur (e.g., change in stage [phase]). The treatment planning and review process [and] shall ensure that:

(1) [that] the primary counselor meets with the offender as needed to review the treatment plan, evaluating goal progress and revisions; [and]

(2) [that] all revised treatment plans are [be] signed and dated by the counselor and the offender; and[.]

(3) results of the review are documented and placed in the treatment file, with a copy to the CSO.

(n) Treatment Progress Notes. There shall be written policies and procedures to require all programs to record and maintain progress notes on all offender case records, document counseling sessions, and to summarize significant events that occur throughout the treatment process. Progress notes shall be documented at a minimum of once each week.

(o) Changes in Treatment Stages [Levels]. Each treatment program shall develop written criteria based on achievement of treatment plan goals for an offender to advance or regress from a stage [level] of treatment. An offender must meet the criteria for a change in the stage[level] of treatment before such a change or a discharge is implemented. The treatment team shall confer when the offender is subject to a major setback in the program and prior to discharge [Justification for level changes must be documented].

(p) Discharges from Treatment. Discharge from a program shall be according to one of [based on] the following criteria:

(1) Successful Discharge--the offender has made sufficient progress towards meeting the objectives of the Treatment Plan, including addressing criminogenic risks/needs [supervision plan] and program requirements;

(2) Administrative Discharge--the offender has satisfied a period of placement as a condition of community supervision, the offender is removed by order of the court, or the offender is removed by operation of law for conduct occurring prior to admission into the program;

(3) Unsuccessful Discharge--the offender has demonstrated non-compliance with the program criteria or court order, including absconding from the program; or[;]

(4) Medical Discharge--the offender manifests a medical or psychological problem, including death, that prohibits participation or completion of the program requirements.[;]

[(5) the offender displays symptoms of a psychological disorder that prohibits participation or completion of the program requirements; or]

[(6) the offender is identified as inappropriate or ineligible for participation in the program as defined by facility eligibility criteria, statute, or standard.]

(q) Discharge Plan [Summary]. The treatment team shall adopt a [A] discharge plan [summary shall be prepared by the primary counselor] for each offender prior to successful discharge [leaving any substance abuse program]. The discharge plan [summary] shall be sent to the offender's [defendant's] supervision officer within seven [(7)] days after [of] discharge and provide a summary [summation] of:

(1) clinical problems at the onset of treatment and original diagnosis;

(2) the problems or needs and strengths or weaknesses identified on the master treatment plan;

(3) the goals and objectives established;

(4) the course of treatment;

(5) the outcomes achieved; and

(6) a continuum of care/relapse plan for aftercare treatment, which must be prepared with the offender and a family member or significant other, if appropriate and available. [a continuum of care plan/aftercare treatment plan, which must be prepared with the offender prior to discharge.]

(r) Discharge Summary. A Discharge Summary shall be prepared for all offenders who leave the program as an unsuccessful, administrative or medical discharge. The summary shall include elements (1) - (6) of the Discharge Plan.

(s) [(r)] General Program Services Provisions. Specific services shall be required of all substance abuse treatment programs. Written policies [policy] and procedures shall ensure the following standards are met:

(1) All substance abuse services shall be delivered according to a written treatment plan that has been developed from the offender's assessment;

(2) Group counseling sessions are limited to a maximum of sixteen offenders. Group education and life skills training sessions are limited to a maximum of thirty-five offenders. These limits do not apply to multi-family educational groups, seminars, outside speakers, or other events designed for a large audience.

(3) [(2)] All programs shall employ a QCC. [Qualified Credentialed Counselor as the Program Director, Clinical Director, Senior Counselor, or the counselor in a similar supervisory position;]

(4) All counselor interns shall work under the direct supervision of a QCC.

(5) Chemical dependency counseling must be provided by a QCC, graduate or counselor who has the specialized education, training, or expertise in the subject matter to be delivered. Chemical dependency education shall be provided by counselors or individuals who have the specialized education, training, or expertise in the subject matter to be delivered.

(6) Direct care staff shall be awake and alert on site during all hours of program operation.

(7) Residential programs shall have at least one counselor on duty at least eight hours a day, five days a week.

(8) Offenders in residential programs shall have an opportunity for eight continuous hours of sleep each night. Staff shall conduct and document at least three checks while offenders are sleeping.

(9) [(3)] The program shall include a culturally diverse curriculum applicable to the population served and shall be evidenced through demonstrated, appropriate counseling and instructional materials.

(10) [(4)] Members of the offender treatment team shall demonstrate effective communications and coordination, as evidenced in staffing, treatment planning and case-management documentation.

(11) [(5)] There shall be written policies and procedures regarding the delivery and administration of prescription and nonprescription medication which provide for:

(A) conformity with state regulations; and

(B) documentation of the administration of medications, medication errors, and drug reactions.

(12) [(6)] Chemical dependency education and life skills training shall follow a course outline that identifies lecture topics and major points to be discussed. All educational sessions shall include offender participation and discussion of the material presented.[;]

(13) [(7)] The program shall provide education about the health risks of tobacco products and nicotine addiction.[;]

(14) [(8)] The program shall provide HIV, Hepatitis B and C and Tuberculosis education based on the Model Workplace Guidelines for Direct Service Providers developed by the Texas Department of State Health Services.[;]

(15) [(9)] Offenders shall have access to HIV counseling and testing services directly or through referral, as follows:[;]

(A) HIV services shall be voluntary, anonymous, and not limited by ability to pay.

(B) counseling shall be based on the model protocol developed by the Texas Department of State Health Services.

(C) in all TDCJ-CJAD funded facilities, testing, as well as pre- and post-test counseling, is to be provided by the medical department or contracted medical provider. [In all facilities, service shall be provided either directly or through referral.]

(16) [(10)] The program shall make testing and information, for tuberculosis and sexually transmitted diseases available to all offenders, unless the program has access to test results obtained during the past year, as follows:[;]

(A) services may be made available directly or through referral.

(B) if an offender tests positive for tuberculosis or a sexually transmitted disease, the program shall refer the offender to an appropriate health care provider and take appropriate steps to protect offenders and staff.

(C) a community corrections facility shall report to the local health department the release of an offender who is receiving treatment for tuberculosis.

(17) [(11)] The program shall:

(A) refer pregnant offenders who are not receiving prenatal care to an appropriate health care provider and monitor follow-through; and

(B) refer offenders to ancillary services (such as mental health services) necessary to meet treatment goals.

(18) CSCDs that contract for services shall give preference to available programs that include the following elements of "Best Practices" in criminal justice treatment. CSCDs that conduct their own programs are required to incorporate the following elements of "Best Practices" in criminal justice treatment:

(A) validated treatment assessments that include substance abuse, dependency or addiction and other criminogenic risks/needs factors;

(B) a treatment regimen that focuses on changing substance abuse, dependency or addiction and other criminogenic risks/needs, behaviors, and thinking patterns;

(C) a treatment regimen that includes a specific, cognitive-behavioral program that has been recognized in professional criminal justice journals; and

(D) responsivity in addressing offenders' needs and in employment of qualified staff.

(19) CSCDs that place offenders in substance abuse treatment programs shall ensure that offenders are referred to available aftercare services, giving preference to programs that incorporate "Best Practice" elements.

(t) [~~(s)~~] Stages [~~Levels~~] of Treatment. All CCFs providing substance abuse treatment shall designate in the current facility's Community Justice Plan (CJP) program proposal stages [~~levels~~] of treatment to be provided as described in subsections (v) [~~sections (t)~~] through (y) [~~(x)~~] below. [~~Beginning in fiscal year 2004, level II and level III treatment programs must include a cognitive-behavioral component for medium and high-risk offenders.~~]

(u) [~~(t) Level I (~~]Detoxification[~~)~~]. Offenders being referred to detoxification services must be referred to appropriately licensed service providers. [~~Written policies and procedures shall ensure the following:~~]

[~~(1) All offenders admitted to Level I (Detoxification) programs shall need detoxification.~~]

[~~(2) Every offender shall have a completed medical history and physical.~~]

[~~(A) Residential offenders shall have a completed physical and medical history and a physical within 24 hours of admission. If the facility cannot meet this deadline because of exceptional circumstances, the circumstances shall be documented in the offender record. Until an offender's medical history and physical is complete, staff shall observe offenders closely (no less than every 15 minutes) and monitor vital signs (no less than once each hour).~~]

[~~(B) Outpatient offenders shall have the medical history and physical completed before admission.~~]

[~~(3) The program shall provide continuous supervision for offenders.~~]

[~~(A) In residential programs, direct care staff shall be awake and on site 24 hours a day.~~]

~~[(i)~~ ~~During day and evening hours, at least two awake staff shall be on duty for the first 12 offenders, with one more person on duty for each additional one to 16 offenders.~~]

~~[(ii)~~ ~~At night, at least one awake staff member shall be on duty for the first 12 offenders, with one more person on duty for each additional one to 16 offenders.~~]

[~~(B) In outpatient programs, direct care staff shall be awake and on site whenever an offender is on site. Offenders shall have access to on-call staff 24 hours a day.~~]

[~~(4) If the program accepts offenders with acute detoxification symptoms or a history of acute detoxification symptoms, the program shall have:~~]

[~~(A) a licensed vocational nurse or registered nurse on duty during all hours of operation;~~]

[~~(B) a physician on-call 24 hours a day.~~]

[~~(5) Level of observation shall be based on medical recommendations and program design, or not less than that described in (2)(A) above.~~]

[~~(6) A physician shall approve all medical policies, procedures, guidelines, tools, and forms, which shall include:~~]

[~~(A) screening instruments (including a medical risk assessment) and procedures;~~]

[~~(B) treatment protocol or standing orders for each chemical the program is prepared to address in detoxification; and ~~]

[~~(C) emergency procedures.~~]

[~~(7) The clinical supervisor shall be a physician, physician assistant, advanced practice nurse, or registered nurse.~~]

[~~(8) The program shall:~~]

[~~(A) ensure continuous access to emergency medical care;~~]

[~~(B) provide offenders access to mental health evaluation and linkage with mental health services when indicated;~~]

[~~(C) use written procedures to encourage offenders to seek appropriate treatment after detoxification.~~]

[~~(9) Direct care staff shall complete detoxification training provided by a physician, physician assistant, advanced practice nurse, or registered nurse that includes instruction in the following areas:~~]

[~~(A) signs of withdrawal;~~]

[~~(B) pregnancy-related complications (if the program admits females of child-bearing age);~~]

[~~(C) observation and monitoring procedures;~~]

[~~(D) appropriate intervention; and~~]

[~~(E) complications requiring transfer.~~]

[~~(10) Staff shall assist each offender in developing an individualized post-detoxification plan that includes appropriate referrals.~~]

(v) [~~(u) Level II (Relapse/~~]Intensive Residential Treatment[~~)~~]. Written policies and procedures shall ensure the following:

(1) All offenders admitted to [~~Level II (Relapse/~~]Intensive Residential Treatment[~~)~~] shall have written justification to support their admission, be medically stable, and able to participate in treatment.

(2) The program shall provide adequate staff for close supervision and individualized treatment with counselor caseloads not to exceed ten [~~(10)~~] offenders.

(3) There shall be direct care staff alert and on site during all hours of operation. There shall be an appropriate number of direct care staff to provide all required program services, maintain an environment that is conducive to treatment, and ensure the safety and security

of the offenders, according to the design of the facility and with the approval of the funding source.

(4) Program [~~For programs 90 days or less~~] counselors shall complete a comprehensive offender assessment and individual treatment plan within ten [~~five (5)~~] working days of admission. [~~All other programs shall complete a comprehensive offender assessment and individual treatment plan within ten (10) working days.~~]

(5) The facility shall deliver not less than twenty-five [~~twenty (20)~~] hours of structured activities per week for each offender, including:

(A) ten [~~(10)~~] hours of chemical dependency counseling using [~~with~~] a cognitive-behavioral approach with no less than one hour of individual counseling;

(B) ten [~~seven (7)~~] hours additional education, counseling, life skills, or rehabilitation activities; and

(C) five [~~three (3)~~] hours of structured social or recreational activities.

(6) Counseling and education schedules shall be submitted to the funding entity for approval.

(7) Each offender shall have an opportunity to participate in physical recreation at least weekly.

(8) Program staff shall offer chemical dependency education or services to identified significant others.

(9) The program shall provide each offender with opportunities to apply knowledge and practice skills in a structured, supportive environment. Cognitive behavioral programs shall have a published curriculum identified by the authors to contain cognitive, social and behavioral elements. Anyone facilitating a cognitive curriculum must be trained in that specific curriculum. All direct care staff must receive training on the principles of a cognitive behavioral model as it relates to their job duties. This curriculum shall be approved by TDCJ-CJAD and implemented as designed. Components of the cognitive program shall at a minimum include:

(A) ways to identify thinking patterns; and

(B) a social skills training component.

(w) [~~(v)~~] Supportive [~~Level III (Community~~] Residential Treatment[~~)~~]. Written policies and procedures shall ensure the following:

(1) All offenders admitted to [~~level III (Community~~] Supportive Residential Treatment[~~)~~] shall have written justification to support their admission, be medically stable, and able to function with limited supervision and support, and be able to participate in work release or community service/restitution programs.

(2) The program shall have adequate staff to meet treatment needs within the context of the program description, with counselor caseloads not to exceed twenty [~~sixteen (16)~~] offenders, unless the program can provide research-based evidence in writing to justify a higher caseload size based on the program design, characteristics, and needs of the population served, and any other relevant factors.

(3) There shall be direct care staff alert and on site during all hours of operation. There shall be an appropriate number of direct care staff to provide for the safety and security of the offenders, according to the design of the facility and with the approval of the funding source.

(4) Counselors shall complete a comprehensive offender assessment and individualized treatment plan within ten [~~(10)~~] working days of admission for all offenders.

(5) The program [~~facility~~] shall deliver no less than six [~~ten (10)~~] hours [~~of structured activities~~] per week of chemical dependency counseling with a cognitive-behavioral approach (one hour per month of which shall be individual counseling) for each offender, [~~including at least five (5) hours of chemical dependency counseling with a cognitive-behavioral approach.~~]

(6) Counseling and education schedules shall be submitted to the funding entity for approval.

(7) The program design and application shall include increasing levels of responsibility for offenders and frequent opportunities for offenders to apply knowledge and practice skills in structured and unstructured settings. Cognitive behavioral programs shall have a published curriculum identified by the authors to contain cognitive, social and behavioral elements. This curriculum shall be approved by TDCJ-CJAD and implemented as designed. Anyone facilitating a cognitive curriculum must be trained in that specific curriculum. All staff must receive training on the principles of a cognitive behavioral model as it relates to their job duties. Components of the cognitive program shall at minimum include:

(A) ways to identify thinking patterns; and

(B) a social skills training component [~~Social Skills Training Component~~].

(x) [~~(w) Level IV (~~] Outpatient Treatment[~~)~~]. Written policies and procedures shall ensure the following:

(1) All offenders admitted to [~~Level IV (~~]Outpatient treatment[~~)~~] programs shall be medically stable, and have appropriate support systems in the community to live independently with minimal structure.

(2) The program shall have adequate staff to provide offenders support and guidance to ensure effective service delivery, safety, and security. Staffing patterns shall be submitted to the funding entity.

(3) The program shall set limits on counselor caseload size to ensure effective, individualized treatment and rehabilitation. Criteria used to set the caseload size shall be documented and approved by the funding entity.

(4) Didactic groups shall not exceed thirty-five [~~35~~] offenders in a group.

(5) Therapeutic groups shall not exceed sixteen [~~16~~] offenders in a group.

(6) For offenders in supportive outpatient programs, counselors shall complete a comprehensive offender assessment within thirty [~~(30)~~] calendar days of admission for all offenders.

(7) For offenders in intensive outpatient programs, counselors shall complete a comprehensive offender assessment within ten [~~(10)~~] calendar days of admission for all offenders.

(8) Intensive outpatient programs shall deliver no less than six [~~ten (10) hours of structured activities per week for each offender, including at least five (5)~~] hours per week of chemical dependency counseling with a cognitive behavioral approach.

(9) Supportive outpatient programs shall deliver no less than two [~~(2)~~] hours per week [~~of structured activities per week for each offender, including at least one (1) hour~~] of chemical dependency counseling.

(10) Counseling and education schedules shall be submitted to the funding entity for approval.

(11) The program design and application shall include increasing levels of responsibility for offenders and frequent opportunities for offenders to apply knowledge and practice skills in structured and unstructured settings.

(12) The outpatient treatment stages [~~levels~~] may be utilized for residents in the work release phase of any residential substance abuse treatment program.

(y) [~~(x)~~] Special Needs Populations. Written policies and procedures shall ensure the following:

(1) Programs that address the special mental health, intellectual capacity, or medical needs of offenders must provide appropriate treatment either by program staff or through contracted services.

(2) Admission to a special needs program must be based on a documented mental health, intellectual capacity, or medical need.

(3) When the assessment process indicates that the offender has coexisting disabilities/disorders, the Treatment Plan shall specifically address those issues that might impact treatment, recovery, relapse, and/or recidivism.

(4) Personnel [~~shall be available who are~~] qualified in the treatment of coexisting disabilities/disorders shall be available.

(5) Within ninety-six [~~(96)~~] hours of admission to a special needs residential program, offenders shall be administered a medical and psychological evaluation.

(6) Within ten [~~(10)~~] days of admission to a residential program for special needs offenders, the program administrator or designee shall contact the Texas Correctional Office on Offenders [~~Council on Offenders~~] with Medical or Mental Impairments (TCOOMMI) [~~(TCOMI)~~] regarding the offender's status. As soon as discharge date is projected, TCOOMMI [~~TCOMI~~] shall be notified in writing of plans for a continuum of care after discharge, regardless of whether or not the discharge is for successful completion of the program.

(7) Residential facilities providing services for special needs populations shall have procedures to provide access to health care services, including medical, dental, and mental health services, under the control of a designated health authority. When this authority is other than a physician, final medical judgments must rest with a single designated responsible physician licensed by the state.

(A) Services/treatment shall be directed toward maximizing the functioning and reducing the symptoms of offenders.

(B) There shall be written policies and procedures regarding the delivery and administration of prescription and nonprescription medication which provide for:

(i) conformity with state regulations;

(ii) documentation of the rationale for use and goals of service/treatment consistent with the individual plan of treatment;

(iii) documentation of the administration of medications, medication errors, and drug reactions; and

(iv) procedures to follow in case of emergencies.

(8) There shall be procedures for documenting that the offender has been informed of medication management procedures.

(9) Offenders shall be actively involved in decisions related to their medications.

(10) Programs for special needs offenders must follow the same staffing for treatment levels as the levels for other offenders, except all residential programs shall maintain caseloads of no greater than sixteen [~~(16)~~] offenders for each counselor.

(11) Programs operating in residential facilities shall ensure that offenders will have no less than ten [~~(10)~~] days of appropriate medication for use after discharge.

(z) Use of Force. The CSCD director and Facility director shall ensure that a residential treatment program has written policies, procedures, and practices that restrict the use of physical force to instances of self-protection, protection of offenders or others, or prevention of property damage. In no event is the use of physical force against an offender justifiable as punishment. A written report shall be prepared following all uses of force, and all such written reports shall be promptly submitted to the CSCD director and Facility director for review and follow-up. The application of restraining devices, aerosol sprays, chemical agents, etc. shall only be accomplished by an individual who is properly trained in the use of such devices and only in an emergency by any individual in self-protection, protection of others or other circumstances as described previously.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 28, 2005.

TRD-200500414
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Earliest possible date of adoption: March 13, 2005
For further information, please call: (512) 463-0422

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 1. MANAGEMENT

SUBCHAPTER F. ADVISORY COMMITTEES

43 TAC §1.85

The Texas Department of Transportation (department) proposes amendments to §1.85, concerning department advisory committees.

EXPLANATION OF PROPOSED AMENDMENTS

House Bill 3588, 78th Legislature, Regular Session, 2003, added new Chapter 227 to the Transportation Code that allows the department to plan and construct a new set of intermodal transportation facilities known as the Trans-Texas Corridor and that will integrate highway, rail, and utility components.

The department is currently engaged in the planning of the Trans-Texas Corridor, and intends to establish development plans for elements of the Trans-Texas Corridor that will define facilities to be developed as part of that element. The scope of work under the comprehensive development agreement for the Oklahoma to Mexico/Gulf Coast element of the Trans-Texas

Corridor (TTC-35) provides for the developer to work with the department to prepare a master development plan that will identify facilities that may be developed as part of the project and to set forth milestones for the development of the project.

At the December 16, 2004 meeting of the Texas Transportation Commission (commission), the Chair requested that rules be drafted that would authorize the creation of an advisory committee to provide checks and balances on the department as it went through the planning process for the Trans-Texas Corridor and the TTC-35 element. Those rules are the subject of this rulemaking.

The amendments to §1.85(a) adds paragraph (5), which authorizes the commission to create an advisory committee concerning the Trans-Texas Corridor, or a project that is part of the Trans-Texas Corridor, for the purpose of facilitating and achieving support and consensus from affected communities, governmental entities, and other interested parties in the planning of the Trans-Texas Corridor and in the establishment of development plans for a project that is part of the Trans-Texas Corridor.

The amendments provide that a Trans-Texas Corridor advisory committee shall provide advice and recommendations to the department regarding facilities to be included in a development plan for the Trans-Texas Corridor or a project that is part of the Trans-Texas Corridor. The advice and recommendations of a committee will provide the department with an enhanced understanding of public, business, and private concerns about the Trans-Texas Corridor and projects that are part of the Trans-Texas Corridor, resulting in a greater cooperation between the department and all affected parties during project planning and development.

The amendments require a Trans-Texas Corridor advisory committee to report its advice and recommendations to the executive director of the department or designee, and provide that an advisory committee may be abolished at any time by the commission, but in any event no later than the date of completion of the Trans-Texas Corridor or the project for which the advisory committee is created.

The amendments also clarify that the members of an advisory committee may be appointed by an office or official different than the office or official to which the advisory committee is to report and make other nonsubstantive corrections to subsections (b) and (c).

FISCAL NOTE

James Bass, Director, Finance Division, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments. There are no anticipated economic costs for persons required to comply with the section as proposed.

Phillip E. Russell, P.E., Director, Texas Turnpike Authority Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT

Mr. Russell has also determined that for each of the first five years the section is in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be to provide the department with an enhanced understanding of public, business, and private concerns about the Trans-Texas Corridor and projects that are part of the Trans-Texas Corridor, thus facilitating the department's communications and project development objectives, resulting in a greater cooperation between the department and all affected parties during project planning and development. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments may be submitted to Phillip E. Russell, P.E., Director, Texas Turnpike Authority Division, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on March 14, 2005.

STATUTORY AUTHORITY: The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Government Code, Chapter 2110, which provides that a state agency that is advised by an advisory committee shall adopt rules that state the purpose of the committee, describe the task of the committee, state the manner in which the committee will report to the agency, and establish a date on which the committee is abolished unless the governing body of the agency affirmatively votes to continue the committee in existence.

CROSS REFERENCE TO STATUTE: Government Code, Chapter 2110.

§1.85. Department Advisory Committees.

(a) Creation.

(1) - (4) (No change.)

(5) Trans-Texas Corridor advisory committees.

(A) Purpose. The commission by order may create an advisory committee concerning the Trans-Texas Corridor or a project that is part of the Trans-Texas Corridor, for the purpose of facilitating and achieving support and consensus from affected communities, governmental entities, and other interested parties in the planning of the Trans-Texas Corridor and in the establishment of development plans for a project that is part of the Trans-Texas Corridor. A committee may be composed of the following members as deemed appropriate by the commission: department staff; affected property owners and business establishments; technical experts; professional consultants representing the department; representatives of local governmental entities; the general public; chambers of commerce; and the environmental community. Advice and recommendations of a committee will provide the department with an enhanced understanding of public, business, and private concerns about the Trans-Texas Corridor and projects that are part of the Trans-Texas Corridor, thus facilitating the department's communications and project development objectives, resulting in greater cooperation between the department and all affected parties during project planning and development.

(B) Duties. A Trans-Texas Corridor advisory committee shall provide advice and recommendations to the department regarding facilities to be included in a development plan for the Trans-Texas Corridor or a project that is part of the Trans-Texas Corridor.

(C) Manner of reporting. A Trans-Texas Corridor advisory committee shall report its advice and recommendations to the executive director or designee.

(D) Duration. A Trans-Texas Corridor advisory committee may be abolished at any time by the commission, but in no event may a committee continue beyond completion of the Trans-Texas Corridor or the project for which the committee is created.

(b) Operating procedures.

(1) Membership. Except as otherwise specified in this section, an [~~An~~] advisory committee shall be composed of not more than 24 members to be appointed by the office or official to whom the committee is to report. When applicable to the purpose and duties of the committee, the membership shall provide a balanced representation between:

(A) industries or occupations regulated or directly affected by the department; and

(B) consumers of services provided either by the department or by industries or occupations regulated by the department.

(2) Meetings.

(A) An advisory committee shall meet once a calendar year and at such other times as requested by the office to which it reports.

(B) A majority of the membership of an advisory committee constitutes a quorum. A committee may take formal action only by majority vote of its membership.

(3) Officers. Each committee shall elect a chair and vice-chair by majority vote of the members of the committee.

(c) Duration. Except as otherwise specified in this section [~~subsection~~], a committee created under this section is abolished December 31, 2005, unless the commission amends its rules to provide for a different date.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 28, 2005.

TRD-200500389
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: March 13, 2005
For further information, please call: (512) 463-8630

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 13. CULTURAL RESOURCES

PART 3. TEXAS COMMISSION ON THE ARTS

CHAPTER 35. A GUIDE TO OPERATIONS, PROGRAMS AND SERVICES

13 TAC §35.2

The Texas Commission on the Arts withdraws the emergency repeal of §35.2 which appeared in the November 12, 2004, issue of the *Texas Register* (29 TexReg 10333). The withdrawal is effective February 20, 2005.

Filed with the Office of the Secretary of State on January 31, 2005.

TRD-200500437
Ricardo Hernandez
Executive Director
Texas Commission on the Arts
Effective date: February 20, 2005
For further information, please call: (512) 936-6564

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13 TAC §35.2

The Texas Commission on the Arts withdraws the emergency new §35.2 which appeared in the November 12, 2004, issue of the *Texas Register* (29 TexReg 10333). The withdrawal is effective February 20, 2005.

Filed with the Office of the Secretary of State on January 31, 2005.

TRD-200500438
Ricardo Hernandez
Executive Director
Texas Commission on the Arts
Effective date: February 20, 2005
For further information, please call: (512) 936-6564

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TITLE 19. EDUCATION

PART 7. STATE BOARD FOR EDUCATOR CERTIFICATION

CHAPTER 232. GENERAL REQUIREMENTS APPLICABLE TO ALL CERTIFICATES ISSUED

SUBCHAPTER R. CERTIFICATE RENEWAL AND CONTINUING PROFESSIONAL EDUCATION REQUIREMENTS

19 TAC §232.850, §232.851

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.38(d), the proposed amendments to §232.850 and §232.851, submitted by the State Board for Educator Certification have been automatically withdrawn. The proposed amendments appeared in the July 23, 2004, issue of the *Texas Register* (29 TexReg 7029).

Filed with the Office of the Secretary of State on January 31, 2005.

TRD-200500427

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TITLE 22. EXAMINING BOARDS

PART 11. BOARD OF NURSE EXAMINERS

CHAPTER 221. ADVANCED PRACTICE NURSES

22 TAC §221.2, §221.7

The Board of Nurse Examiners has withdrawn from consideration the proposed amendment to §221.2 and §221.7, which appeared in the August 13, 2004 issue of the *Texas Register* (29 TexReg 7862).

Filed with the Office of the Secretary of State on January 26, 2005.

TRD-200500371
Katherine Thomas
Executive Director
Board of Nurse Examiners
Effective date: January 27, 2005
For further information, please call: (512) 305-6823

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the the rule (Government Code, §2001.036). If a rule is adopted without change to the text as published in the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 1. OFFICE OF THE GOVERNOR

CHAPTER 3. CRIMINAL JUSTICE DIVISION

The Office of the Governor, Criminal Justice Division (CJD), adopts the amendment of Subchapter A, §3.3 and §3.19; Subchapter B, §§3.51, 3.53, and 3.79; Subchapter C, §§3.103, 3.401, 3.403, 3.405, 3.503, 3.505, 3.511, 3.603, 3.703, 3.719, 3.721, 3.803, 3.1205, 3.1301, 3.1303, and 3.1305; Subchapter E, §§3.2501, 3.2519, and 3.2527; and Subchapter G, §3.8210, without changes to the proposed text as published in the December 24, 2004, issue of the *Texas Register* (29 TexReg 11825).

CJD adopts the amendment of Subchapter B, §3.87 with changes to the proposed text as published in the December 24, 2004, issue of the *Texas Register* (29 TexReg 11825). A comma was added after the word "agency" in subsection (c) to correct the grammar in this subsection.

CJD adopts the addition of Subchapter C, §3.1311, without changes to the proposed text as published in the December 24, 2004, issue of the *Texas Register* (29 TexReg 11825).

CJD adopts the repeal of Subchapter C, §§3.1001, 3.1003, and 3.1005, without changes to the proposal as published in the December 24, 2004, issue of the *Texas Register* (29 TexReg 11825).

The amendment to §3.3: (1) clarifies in paragraph (12) that drug court fees collected pursuant to §469.004, Texas Health and Safety Code, are not considered program income because drug courts are authorized by the legislature to collect such fees; and (2) changes the way the dollar amount is written in paragraph (13)(B) to ensure the use of uniform language in this chapter.

The amendment to §3.19: (1) corrects the punctuation in subsection (b); and (2) in subsection (b)(5), clarifies the organizations to whom Office of Management and Budget (OMB) Circular No. A-110 is applicable.

The amendment to subsections (a) and (c) of §3.51 clarifies that a community plan must not simply address the community's criminal justice "needs," but must address the specific criminal justice "priorities" of the community.

The amendment to §3.53: (1) updates the section to include the current priorities developed in coordination with the Governor's Juvenile Justice Advisory Board; and (2) clarifies that projects must address the "priorities" listed in this section.

Instead of requiring task force personnel to travel to points at least 50 miles from the agency headquarters to be permitted to receive reimbursement for meals and lodging, the amendment to subsection (a) of §3.79 now requires task force personnel to travel to points at least 50 miles from their assigned location. This revision takes in account the fact that many task force personnel are assigned to locations other than the agency headquarters.

The amendment to §3.87 clarifies that: (1) CJD may require or allow a grantee receiving grant funds for a multi-jurisdictional drug task force project under the Byrne Formula Grant Program or grant funds under the State Criminal Justice Planning (421) Fund to transfer program income to another grant, grantee, agency, or CJD in accordance with the Uniform Grant Management Standards (UGMS) and the applicable federal requirements for the Byrne Formula Grant Program; (2) the listed grantees may request to carry forward program income from one grant period to the next in accordance with the requirements of UGMS and the applicable federal requirements for the Byrne Formula Grant Program; (3) a request to carry forward program income must be submitted to CJD with the grantee's final financial expenditure report because a request to carry forward program income necessitates the reporting of the amount of program income earned by the grantee; (4) the grantee must report program income in a timely and accurate manner to be eligible to carry over program income from one grant period to the next to promote accurate and efficient reporting of program income; (5) program income carried over from one grant period to the next must be used to further the objective of the grant project to ensure that the income is used in an effective and appropriate manner. In addition, the amendment corrects the grammar in this subsection by adding comma after the word "agency" in subsection (c).

The amendment to paragraph (2) of §3.103 clarifies that only applicants that are requesting grant funds for a juvenile project or a project serving delinquent or at-risk youth must meet the requirements of §3.53.

The amendment to subsections (a) and (b) of §3.401 updates the language of the subsections to reflect the current federal legislation applicable to the Safe and Drug-Free Schools and Communities Act Fund.

The amendment to §3.403 makes changes to the spelling and grammar in this section to ensure the use of uniform language in this chapter.

The amendment to §3.405 changes "These grantees" to "Grantees" to ensure the use of uniform language in this chapter.

The amendment to §3.503 makes changes to the spelling and grammar in this section to ensure the use of uniform language in this chapter.

The amendment to §3.505 conforms the requirements for eligible applicants under the Victims of Crime Act Fund to the federal requirements for this funding source.

The amendment to §3.511: (1) replaces former paragraph (6) with former paragraph (21) because former paragraph (6) is duplicative of former paragraph (21); and (2) makes a change to the grammar in paragraph (7) to ensure the use of uniform language in this chapter.

The amendment to §3.603 makes a change to the spelling in this section to ensure the use of uniform language in this chapter.

The amendment to paragraphs (3), (5), (9), (18) and (28) of §3.703 makes changes to the grammar in this section to ensure the use of uniform language in this chapter.

The amendment to §3.719 requires an applicant for a multi-jurisdictional drug task force project or other drug enforcement project to maintain on file a signed copy of district attorney agreements instead of requiring the district attorney agreements to be submitted to CJD with the grant application.

The amendment to §3.721: (1) requires that all projects that are involved in drug enforcement are required to certify that they conduct drug testing; and (2) clarifies the language of this section.

The amendment to §3.803: (1) clarifies that projects with a local impact are eligible under the Local Law Enforcement Block Grant Program pursuant to the federal requirements for this funding source; and (2) conforms the language of paragraph (2) to the federal requirements for this funding source.

The amendment to subsection (a) of §3.1205: (1) adds nonprofit corporations and faith-based organizations to the list of eligible applicants in accordance with the federal requirements for the Juvenile Accountability Block Grant Program; and (2) makes a change to the reference within this section to ensure the use of uniform language in this chapter.

The amendment to subsection (b) of §3.1301 updates the language of this subsection to reflect the current citation for the Coverdell Forensic Sciences Program.

The amendment to §3.1303 expands the list of eligible applicants to include accredited laboratories, as well as unaccredited laboratories that are in the process of obtaining accreditation, and permits funds to be used for the salaries and wages of state or local personnel, pursuant to the federal requirements for the Coverdell Forensic Sciences Program.

The amendment to §3.1305 expands the list of eligible applicants to include accredited laboratories, as well as unaccredited laboratories that are in the process of obtaining accreditation, as allowed under the federal requirements for the Coverdell Forensic Sciences Program.

The amendment to subsection (a)(2) of §3.2501 makes a change to the grammar and capitalization in this section to ensure the use of uniform language in this chapter.

The amendment to §3.2519 clarifies that CJD may reduce or terminate a grant under the circumstances listed in this section. One of the circumstances under which CJD is permitted to reduce or terminate a grant is when state or federal funds are no longer available to CJD or are insufficient to fund a grant project.

The amendment to subsection (c) of §3.2527 makes a change to the grammar in this section to ensure the use of uniform language in this chapter.

The amendment to §3.8210 updates the language of the section to reflect the current federal legislation applicable to the Governor's Juvenile Justice Advisory Board.

The addition of §3.1311 clarifies ineligible activities and costs under the Coverdell Forensic Sciences Program.

The repeal of §§3.1001, 3.1003 and 3.1005 deletes provisions applicable to the federal Challenge Grant Program, which is no longer administered by CJD.

CJD reviewed the rules affecting the CJD grant processes and procedures with the goal of increasing efficiency and updating the rules to address changes in the administration process. The review disclosed that a number of the rules required further clarification and simplification. As a result, CJD adopts the amendment, addition, and repeal of the sections in the Texas Administrative Code identified above.

SUBCHAPTER A. GENERAL GRANT PROGRAM PROVISIONS

1 TAC §3.3, §3.19

The amendment of these rules is adopted under the Texas Government Code, Title 7, §772.006(a)(10), which authorizes CJD to adopt rules and procedures as necessary.

The amended rules implement the Texas Government Code, Title 7, §772.006(a), which requires CJD to award and administer state and federal grant programs, and to assist the Governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles, or codes are affected by the amendment of these rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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David Zimmerman
Assistant General Counsel
Office of the Governor
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SUBCHAPTER B. GENERAL GRANT PROGRAM POLICIES
DIVISION 1. ELIGIBILITY REQUIREMENTS

1 TAC §3.51, §3.53

The amendment of these rules is adopted under the Texas Government Code, Title 7, §772.006(a)(10), which authorizes CJD to adopt rules and procedures as necessary.

The amended rules implement the Texas Government Code, Title 7, §772.006(a), which requires CJD to award and administer state and federal grant programs, and to assist the Governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles, or codes are affected by the amendment of these rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 2. GRANT BUDGET REQUIREMENTS

1 TAC §3.79, §3.87

The amendment of these rules is adopted under the Texas Government Code, Title 7, §772.006(a)(10), which authorizes CJD to adopt rules and procedures as necessary.

The amended rules implement the Texas Government Code, Title 7, §772.006(a), which requires CJD to award and administer state and federal grant programs, and to assist the Governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles, or codes are affected by the amendment of these rules.

§3.87. Program Income.

(a) Rules governing the use of program income are included in the provisions adopted by reference in §3.19 of this chapter.

(b) Program income may only be used for allowable project costs as reflected in an approved budget, except as provided in subsection (c) of this section. Otherwise, grantees must refund program income to CJD.

(c) CJD may require or allow a grantee receiving grant funds for a multi-jurisdictional drug task force project under the Byrne Formula Grant Program or grant funds under the State Criminal Justice Planning (421) Fund to transfer the CJD portion of program income to another grant, grantee, agency, or to CJD.

(d) Grantees may not carry forward program income from one grant year to the next, except as provided by subsections (e) and (f) of this section.

(e) A grantee receiving grant funds for a multi-jurisdictional drug task force project under the Byrne Formula Grant Program may request to carry forward program income obtained from forfeiture actions from one grant period to the next.

(f) A grantee receiving grant funds under the State Criminal Justice Planning (421) Fund may request to carry forward program income from one grant period to the next.

(g) A request to carry forward program income in accordance with subsections (e) and (f) of this section must be submitted to CJD with the grantee's final financial expenditure report. Program income may not be carried forward without written CJD approval. A grantee must report program income on its quarterly financial expenditure reports in a timely and accurate manner to be eligible to carry forward program income in accordance with subsections (e) and (f) of this section.

(h) Program income carried forward in accordance with subsections (e) and (f) of this section must be used to further the objectives of the grant project.

(i) As provided in §3.3(12) of this chapter, all funds, accrued interest, and property awarded to a grantee under a forfeiture action represent program income.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. FUND-SPECIFIC GRANT POLICIES

DIVISION 1. STATE CRIMINAL JUSTICE PLANNING (421) FUND

1 TAC §3.103

The amendment of this rule is adopted under the Texas Government Code, Title 7, §772.006(a)(10), which authorizes CJD to adopt rules and procedures as necessary.

The amended rule implements the Texas Government Code, Title 7, §772.006(a), which requires CJD to award and administer state and federal grant programs, and to assist the Governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles, or codes are affected by the amendment of this rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 4. SAFE AND DRUG-FREE SCHOOLS AND COMMUNITIES ACT FUND

1 TAC §§3.401, 3.403, 3.405

The amendment of these rules is adopted under the Texas Government Code, Title 7, §772.006(a)(10), which authorizes CJD to adopt rules and procedures as necessary.

The amended rules implement the Texas Government Code, Title 7, §772.006(a), which requires CJD to award and administer state and federal grant programs, and to assist the Governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles, or codes are affected by the amendment of these rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 5. VICTIMS OF CRIME ACT FUND

1 TAC §§3.503, 3.505, 3.511

The amendment of these rules is adopted under the Texas Government Code, Title 7, §772.006(a)(10), which authorizes CJD to adopt rules and procedures as necessary.

The amended rules implement the Texas Government Code, Title 7, §772.006(a), which requires CJD to award and administer state and federal grant programs, and to assist the Governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles, or codes are affected by the amendment of these rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 6. CRIME STOPPERS ASSISTANCE FUND

1 TAC §3.603

The amendment of this rule is adopted under the Texas Government Code, Title 7, §772.006(a)(10), which authorizes CJD to adopt rules and procedures as necessary.

The amended rule implements the Texas Government Code, Title 7, §772.006(a), which requires CJD to award and administer state and federal grant programs, and to assist the Governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles, or codes are affected by the amendment of this rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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David Zimmerman
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DIVISION 7. BYRNE FORMULA GRANT PROGRAM

1 TAC §§3.703, 3.719, 3.721

The amendment of these rules is adopted under the Texas Government Code, Title 7, §772.006(a)(10), which authorizes CJD to adopt rules and procedures as necessary.

The amended rules implement the Texas Government Code, Title 7, §772.006(a), which requires CJD to award and administer state and federal grant programs, and to assist the Governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles, or codes are affected by the amendment of these rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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David Zimmerman
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DIVISION 8. LOCAL LAW ENFORCEMENT BLOCK GRANT PROGRAM

1 TAC §3.803

The amendment of this rule is adopted under the Texas Government Code, Title 7, §772.006(a)(10), which authorizes CJD to adopt rules and procedures as necessary.

The amended rule implements the Texas Government Code, Title 7, §772.006(a), which requires CJD to award and administer state and federal grant programs, and to assist the Governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles, or codes are affected by the amendment of this rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 10. CHALLENGE GRANT PROGRAM

1 TAC §§3.1001, 3.1003, 3.1005

The repeal of these rules is adopted under the Texas Government Code, Title 7, §772.006(a)(10), which authorizes CJD to adopt rules and procedures as necessary.

The repealed rules implement the Texas Government Code, Title 7, §772.006(a), which requires CJD to award and administer state and federal grant programs, and to assist the Governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles, or codes are affected by the repeal of these rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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David Zimmerman
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DIVISION 12. JUVENILE ACCOUNTABILITY BLOCK GRANT PROGRAM

1 TAC §3.1205

The amendment of this rule is adopted under the Texas Government Code, Title 7, §772.006(a)(10), which authorizes CJD to adopt rules and procedures as necessary.

The amended rule implements the Texas Government Code, Title 7, §772.006(a), which requires CJD to award and administer state and federal grant programs, and to assist the Governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles, or codes are affected by the amendment of this rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 13. COVERDELL FORENSIC SCIENCES PROGRAM

1 TAC §§3.1301, 3.1303, 3.1305, 3.1311

The amendment and addition of these rules are adopted under the Texas Government Code, Title 7, §772.006(a)(10), which authorizes CJD to adopt rules and procedures as necessary.

The amended and added rules implement the Texas Government Code, Title 7, §772.006(a), which requires CJD to award and administer state and federal grant programs, and to assist

the Governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles, or codes are affected by the amendment and addition of these rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. ADMINISTERING GRANTS

1 TAC §§3.2501, 3.2519, 3.2527

The amendment of these rules is adopted under the Texas Government Code, Title 7, §772.006(a)(10), which authorizes CJD to adopt rules and procedures as necessary.

The amended rules implement the Texas Government Code, Title 7, §772.006(a), which requires CJD to award and administer state and federal grant programs, and to assist the Governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles, or codes are affected by the amendment of these rules.

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SUBCHAPTER G. CRIMINAL JUSTICE DIVISION ADVISORY BOARDS

DIVISION 2. GOVERNOR'S JUVENILE JUSTICE ADVISORY BOARD

1 TAC §3.8210

The amendment of this rule is adopted under the Texas Government Code, Title 7, §772.006(a)(10), which authorizes CJD to adopt rules and procedures as necessary.

The amended rule implements the Texas Government Code, Title 7, §772.006(a), which requires CJD to award and administer state and federal grant programs, and to assist the Governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles, or codes are affected by the amendment of this rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 354. MEDICAID HEALTH SERVICES

SUBCHAPTER A. PURCHASED HEALTH SERVICES

DIVISION 32. DISEASE MANAGEMENT

1 TAC §§354.1415 - 354.1417

The Texas Health and Human Services Commission (HHSC) adopts amendments to §354.1415, concerning disease management vendor requirements and conditions for participation in the Medicaid program, with changes to the proposed text as published in the December 3, 2004, issue of the *Texas Register* (29 TexReg 11208). The text of the rule will be republished. In addition HHSC adopts new §354.1416, which outlines the eligibility criteria for the Disease Management Program, and §354.1417, which provides definitions for Disease Management services, without changes to the proposed text as published in the December 3, 2004, issue of the *Texas Register* (29 TexReg 11208) and will not be republished.

HHSC did not receive any comments regarding the proposed amendments to §354.1415 or to the proposed new §354.1416 and §354.1417 during the comment period, which included a public hearing on December 16, 2004.

The amendment and new rules are adopted under the Texas Government Code, §531.033, which provides the commissioner of HHSC with broad rulemaking authority; the Human Resources Code, §32.021, and the Texas Government Code, §531.021(a), which provide HHSC with the authority to administer the federal

medical assistance (Medicaid) program in Texas; and the Texas Government Code, §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

§354.1415. Vendor Requirements and Conditions for Participation.

(a) In addition to the general requirements for contractors listed in Chapter 391, Purchase of Goods and Services by the Health and Human Services Agencies and Chapter 392, Procurements by the Health and Human Services Commission, disease management companies must meet all of the following program requirements to be considered for a contract with the state. Entities who wish to contract with the Health and Human Services Commission (HHSC) to provide disease management services must meet the following conditions:

(1) Have an appropriate method for using HHSC healthcare data to identify targeted disease populations;

(2) Have nationally recognized evidence-based healthcare practice guidelines with minimum standards of care and clinical outcomes for each targeted disease;

(3) Have collaborative healthcare practice models in place to include HHSC's contracted physicians, support service providers, and existing community resources;

(4) Ensure that a recipient's primary care physician (PCP) and other appropriate specialty physicians, or registered nurses, advance practice nurses, or physician assistants become directly involved in the disease management program through which the recipient receives services;

(5) Have patient self-care management education materials and methods appropriate to each targeted disease population that demonstrate cultural competency;

(6) Have service provider education materials and methods appropriate to each targeted disease population;

(7) Have process and outcome measurements, evaluations, and management systems based on standardized best practice guidelines;

(8) Have routine reporting processes that are proven to properly support disease management goals;

(9) Have demonstrable, measurable, and successful experience in disease management for the targeted disease populations;

(10) Provide access to 24 hour-a-day, seven days-per-week nurse call center;

(11) Have the ability to guarantee program savings;

(12) Ensure compliance with all laws, regulations, and administrative rules that govern the performance of the disease management services and deliverables including all state and federal tax laws, employment laws, regulatory requirements, and licensing provisions;

(13) Ensure each of its personnel who provides services or deliverables through the disease management program is properly licensed, certified, and/or has proper permits to perform the required disease management activities;

(14) Ensure data entered, maintained, or generated to meet disease management program requirements are retained and accessible according to Federal requirement 42 CFR §431.17 and in accordance with the Health and Human Services Commission Medicaid Records Retention and Disposition Schedule;

(15) Maintain an accounting system that provides an audit trail containing sufficient financial documentation to allow for the reconciliation of billings, expenses, and financial information with all general ledger accounts applicable to the contract;

(16) Maintain and retain financial records and supporting documents relating to the disease management program for a period of five years, after the date of the final payment under the contract, or until the resolution of all litigation, claims, and financial management review or audit pertaining to the contract, whichever is longer.

(17) Provide authorized state and federal governments full access to all information needed to conduct reviews and audits required by law or by the contract in accordance with applicable auditing standards;

(18) Ensure contractor's systems and processes, to include files or data transferred from the contractor's internal system, comply with the requirements of the Health Insurance Portability Accountability Act of 1996 (Public Law 104-191) ("HIPAA"); and

(19) Ensure contractor and its subcontractors will comply with any policy, rule, or reasonable requirement of HHSC that relates to the safeguarding or disclosure of information relating to Medicaid applicants and recipients, contractor's operations, or the disease management services.

(b) The contracted disease management vendor must provide at a minimum, the following services to eligible clients and participating providers:

(1) Identify eligible clients and stratify them based on health severity level and risk for non-adherence to recommended care;

(2) Provide appropriate interventions that may include, at a minimum, development, implementation, and evaluation of an individual plan of care that:

(A) addresses the client's (multiple) health, behavioral, and social needs to ensure continuity, quality of care, and effectiveness;

(B) assures and facilitates appropriate collaboration between the client's family and/or caregivers, health care providers, and community case managers; and

(C) links health care providers with allied health and social services agencies to facilitate access to necessary services. This includes, but is not limited to, medically necessary services such as pharmacy, mental health, equipment and supplies, rehabilitative therapies, and transportation or interpreter services.

(3) Intensive outreach to find hard-to-serve clients, including home visits if the client does not have telephone service available, or cognitive or physical difficulties that interfere with phone usage. The vendor must use effective, appropriate, and culturally sensitive methods to accomplish this service;

(4) Enroll eligible clients in the disease management program and track active acceptance, refusal to participate, and disenrollment information;

(5) Establish a medical home or primary care provider for clients as needed;

(6) Identify gaps between recommended prevention and treatment and actual care provided to clients. Assure that client's medical care follows nationally recognized evidence-based guidelines for practice. Give providers feedback on differences between recommended prevention and treatment and actual care received by clients, and client adherence to their plan of care;

(7) Assess client's adherence to prescribed medical care and instructions;

(8) Prepare initial health assessments and conduct periodic health status follow-ups based on the risk and health severity level of the client. In-person visits are required for hard to reach clients;

(9) Assist client in accessing appropriate primary and preventive medical care;

(10) Development and demonstration of educational and care management techniques by phone and face-to-face personal interaction;

(11) Development and circulation of client educational materials which must be:

(A) written at the 5th grade reading level;

(B) available for clients who are blind, sight impaired, or have reading impairments; and

(C) provided in a language that may be understood by each individual client.

(12) Educate eligible clients and/or their caregivers regarding the client's particular health care condition and needs to:

(A) Increase the client's understanding of his or her disease and become more effective in self-care management of their health problems;

(B) understand the appropriate use of resources needed to care for his or her problem(s);

(C) identify negative changes in his or her health condition and seek appropriate attention before reaching crisis levels; and

(D) become more compliant with medical recommendations.

(13) Provide a 24 hour-a-day, seven day-a-week, culturally sensitive, toll-free nurse consultation service to respond to eligible clients and/or caregivers' questions;

(14) Have English and Spanish-speaking nurses, with other languages available through a translation or interpretation service. Translation and interpreter services should be available on-line and not require an additional phone call by the client;

(15) Provide service referrals for specialty, social and ancillary services through the use of a nurse consultation telephone line;

(16) Maintain documentation of disease management services in a member file and distribute to appropriate providers on a periodic basis;

(17) Develop collaboration with client and local hospitals to receive timely notification of hospital admissions of disease management clients;

(18) Provide care coordination support, discharge planning for early discharge and to prevent readmissions, revisions to client's plan of care as appropriate, and on-site visits when needed;

(19) Develop a process to respond to client and provider complaints;

(20) Provide intensive recruitment of providers (including specialists when warranted by the client's medical condition) to participate in the disease management program and serve as primary care providers, or as a medical home for eligible clients as needed;

(21) Develop and offer provider education regarding specific evidence-based guidelines selected for use;

(22) Ensure that there are no barriers to medical provider input into the development of the eligible client's plan of care;

(23) Implement a system for providers to request specific disease management interventions;

(24) Provide assistance in assuring necessary specialists care; and

(25) Provide reports on client's health status changes to their participating primary care provider.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6900

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CHAPTER 355. REIMBURSEMENT RATES
SUBCHAPTER J. PURCHASED HEALTH SERVICES
DIVISION 34. DISEASE MANAGEMENT PROGRAM

1 TAC §355.8640

The Health and Human Service Commission (HHSC) adopts new §355.8640, Reimbursement for the Disease Management Program, without changes to the proposed text as published in the December 3, 2004, issue of the *Texas Register* (29 TexReg 11212) and will not be republished.

New §355.8640 describes the reimbursement process for disease management contractors, which uses a prepayment methodology in compliance with 42 C.F.R. §438.6(c). Capitation payments are made on a monthly basis. Capitation rates vary according to the specific disease state group.

HHSC did not receive any comments regarding the proposed rule during the comment period, which included a public hearing on December 16, 2004.

The new rule is adopted under Texas Government Code §531.033, which provides the commissioner of HHSC with broad rulemaking authority; Human Resources Code §32.021 and the Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 10. COMMUNITY DEVELOPMENT

PART 7. TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

CHAPTER 304. WARRANTIES AND BUILDING AND PERFORMANCE STANDARDS

The Texas Residential Construction Commission ("commission") adopts new Chapter 304, relating to Warranties and Building and Performance Standards. Subchapter A, §§304.1 - 304.3, subchapter B, §§304.10 - 304.33, subchapter C, §§304.50 - 304.52 and subchapter D, §304.100, are adopted with changes to the proposed text as published in the October 22, 2004 issue of the *Texas Register* (29 TexReg 9759). The new chapter outlines the statutorily mandated minimum warranties and performance standards for residential construction throughout the State of Texas.

The sections are adopted to implement House Bill 730 (Act effective Sept. 1, 2003, 78th Leg., R.S., ch. 458, §1.01). The new sections are adopted under Property Code §408.001, which provides general authority for the commission to adopt rules necessary to implement Title 16, Property Code; Property Code Chapter 426, which requires the commission to implement warranties and performance standards for use in the State-sponsored Inspection and Dispute Resolution Process (SIRP); and Property Code §430.001, which provides specific authority to adopt rules establishing limited statutory warranty and building and performance standards for residential construction.

The commission has determined that these sections will become effective on June 1, 2005. These sections will apply to all residential construction that commences on or after June 1, 2005, if the construction is for a new home, material improvement to an existing home or an interior renovation to an existing home that costs in excess of $20,000. For the purpose of determining applicability, the date of commencement is the earlier of the date that the parties enter into an agreement for a transaction governed by the Act or the date that work commences on or after June 1, 2005. The commission has revised the proposed sections to state the effective date in §304.1(b).

Subchapter A, General Provisions, §§304.1 - 304.3, provides for definitions, the applicability of the International Residential Code and National Electrical Code to residential construction, the implementation of warranty and performance standards and general conditions that identify builder and homeowner responsibilities. The subchapter describes general builder responsibilities, general homeowner responsibilities and general exclusions from or conditions affecting the application of the performance standards contained in the chapter. The subchapter also describes the minimum warranty periods adopted by the commission and the warranty of habitability.

Subchapter B, Performance Standards for Components of a Home Subject to a Minimum Warranty of One-Year for Workmanship and Materials, §§304.10 - 304.33, provides performance standards for those components of a home or home improvement that are subject to the minimum one-year warranty period provided for in subchapter A of this chapter. This subchapter provides standards for components of a home including foundations, framing, doors, windows, electrical fixtures, plumbing accessories, cooling and heating systems, interior trim, fencing and pest control. The standards include statements of builder and homeowner responsibilities and exclusions where applicable.

Subchapter C, Performance Standards for Plumbing, Electrical, Heating and Air-conditioning Delivery Systems Subject to a Minimum Warranty Period of Two Years, §§304.50 - 304.52, provides for performance standards for plumbing, electrical, heating and air-conditioning delivery systems that are subject to the minimum two-year warranty period provided for in subchapter A of this chapter. This subchapter provides for specific standards of performance for elements such as wiring, breakers, electrical fixtures, plumbing accessories, pipes, wastewater treatment systems, heating and cooling system components and ductwork. The standards include statements of builder and homeowner responsibilities and exclusions where applicable.

Subchapter D, Performance Standards for Major Structural Components of a Home Subject to a Minimum Warranty Period of Ten Years, §304.100, provides performance standards for foundations and other structural components of a home that are subject to the minimum ten-year warranty provided for in subchapter A of this chapter.

The commission enlisted the assistance of the Texas A & M University College of Architecture, Construction Science Department ("TAMU") in the development of the warranties and building and performance standards. The TAMU faculty and students attempted to develop a list of each component of a home in which a defect is likely to occur. Each component then was assigned a performance standard. To develop the warranties and to assign a performance standard to each component TAMU: 1) reviewed the standards of other states, warranty companies and the industry; 2) considered the minimum standards in the International Residential Code, the National Electrical Code and the U.S. Housing and Urban Development standards; and 3) considered the cost impact and regional climactic differences of each performance standard. TAMU's draft was then provided to the commission for the final development of an initial "working draft". This "working draft" was then disseminated to the public and posted on the agency's website. Written comment on the working draft was invited and received.

To ensure statewide participation in the development of the new warranties and performance standards, the commission held informal "town hall" styled meetings in Houston, McAllen, Austin, San Antonio, Laredo, Lubbock Longview, Dallas and El Paso from August 3 to August 31, 2004. The stakeholder audiences included engineers, inspectors, homeowners and builders. The commission also held a public meeting in its offices on September 9, 2004 in which a representative of TAMU engaged in dialogue with attendees on their comments and suggestions regarding the working draft. From the written comments, verbal comments and suggestions on the proposed draft and the dialog with the various audiences regarding their concerns, the commission revised its draft proposal. Many of the issues raised and comments suggested were incorporated into a final version that was accepted by the commission as a proposal for publication at the commission's October 5, 2004 Open Meeting.

The proposed new sections were published in the October 22, 2004 issue of the *Texas Register* and a period of thirty days was provided for acceptance of public comment on the proposed rules. A correction was published in the October 29, 2004 issue of the *Texas Register* at (29 TexReg 10172) regarding §304.12(g). Notice provided that interested persons could submit written comments (12 copies) on the proposed sections to Susan K. Durso, General Counsel, Texas Residential Construction Commission, P.O. Box 13144, Austin, Texas, 78711. The commission also accepted comments submitted electronically to comments@trcc.state.tx.us, if "Chapter 304 comments" was placed in the subject line. Notice provided that comments sent to another electronic address or that do not have "Chapter 304 comments" in the subject line may not be considered. Comments not timely received were not considered.

Finally, the commission held a public hearing to accept oral comments on the rules pursuant to Tex. Gov't Code §2001.029 at the commission offices on November 9, 2004. Those who appeared and provided oral comment were Victor Drozd, representing the Bryan-College Station Homebuilders Association (BCSHA); Roger Williams and Shaw Wulfson, who are also with the Bryan-College Station Homebuilders Association (included in references to BCSHA); Robert F. Pierry, Jr., P.E., owner of Roger Bullivant of Texas and representative of the American Society of Civil Engineers (Pierry); Larry Foster (Foster); Scott Norman, Vice President and General Counsel of the Texas Association of Builders (TAB); Mark Eberwine (Eberwine); Steve Pawlowski, Law Offices of Anne Stark, P.C., attorneys representing homeowners and builders (Stark); Glenn Motheral, owner of Austin Design Build of Fort Worth and representing the Greater Fort Worth Builders Association (GFWBA); Janet Ahmad, representing Homeowners for Better Builders (HOBB); Randy Streetman, representing Streetman Homes (Streetman); and Llewel Walters, representing Lennar Homes (Lennar).

The commission received written comments from Brant Roeming, Bonded Builders Home Warranty of Texas (Bonded Builders); John R. Cobarruvias, Homeowners Against Deficient Dwellings of Texas (HADD); Mark Eberwine (Eberwine); W.T. Little (Little); Jay Dyer of TAB; Kimberley Jacobs of BCSHA (BCHSA); James T. Houston, P.E., PhD (Houston); Mark Daigle, Tilson Home Corporation (Tilson); Robert Peirry, Jr. (Pierry); Fred Parker, Fred Parker Company, Inc. (Parker); Janet Ahmad, HomeOwners for Better Building (HOBB); Tom Bothell (Bothell); Sam Beck, Miller Brothers Floors (Miller); John "Chip" Henderson (Henderson); Greg Parish, Parish Electric Co. of Fort Worth, Inc. (Parish); Larry J. Foster, Foster Inspections & Construction Consulting, Inc. (Foster); Doug Larkins, ACES A/C Supply (Larkins); David Grissom, Foundation Performance Association (Grissom); Dennis Vint (Vint); Marius J. Mes, Ph. D., P.E., Foundation Performance Organization (FBO); Carol Baker, Capitol City Insurance Agency (Baker); Jim Poage, texRES - Highland Lakes (Poage); Kimberly Kapavik, Greater San Antonio Builders Association (GSABA); Anne P. Stark and Steven J. Pawlowski, Law Office of Anne P. Stark, P.C. (Stark); Pam Borchert, Victoria Builders Association (VBA); Gregory A. Harwell, Gardere & Wynne (Harwell); and Albert Hernandez, No-Burn of Bexar County (No-Burn).

If the commission received both oral and written comments from an individual or representatives of an entity, the commission will refer to the comment without distinguishing whether the comment was received orally or in writing.

All comments regarding these sections that were properly addressed and timely received, including any not specifically referenced herein, were fully considered by the commission. In addition to revisions resulting from comments received, the commission has made other minor modifications to the proposed sections for the purpose of clarifying its intent and improving style and readability.

The commission received written comments from Bonded Builders and HADD suggesting training for third-party inspectors who are appointed by the commission pursuant to 10 Texas Administrative Code §313.11 (10 TAC §313.11) on the standards set forth in these sections. The commission agrees with Bonded Builders and HADD on this issue and notes that training is required by commission rule 10 TAC §303.207 and by Prop. Code §427.001(d); however, these comments have not resulted in any changes to the proposed text in these sections. Poague added that the term "third-party inspector" should be defined and that such an inspector should be at least International Code Council (ICC) Code combination certified. Third-party Inspectors appointed by the commission meet the requirements adopted by the commission in 10 TAC ch. 303, including the requirement that the third-party inspectors be ICC Code combination certified when required by statute.

Section 304.1(a) sets forth the scope of chapter 304. Eberwine and Foster suggested that the commission revise §304.1(a) by adding the language "and shall comply with the applicable sections of the I.R.C. and N.E.C." to the very last sentence of the subsection. Foster explained that this addition would make clear that all provisions of the Code apply because many readers do not understand that the Code incorporates many standards by reference. The commission agrees that reference to the applicable codes would clarify the commission's intent and, thus, it has added language to the section accordingly. HADD commented that assigned third-party inspectors should be allowed to make a determination on a defect that is not covered by the adopted performance standards based upon the inspector's training. However, the proposed language for §304.1(a) is grounded in the statutory language of Prop. Code §401.002 and provides an objective standard for the third-party inspectors. Therefore, the commission declines to make a change based on HADD's comment regarding this section.

Section 304.1(b) which included the definitions as proposed has become §304.1(c) in the adopted rule. Section 304.1(c) includes definitions to be used in chapter 304. Eberwine commented on the definitions, including that the definition of "adverse effect" should not be limited to habitable areas of the home but also should include the exterior, garage, attic, utility rooms, closets, etc., of a home. Property Code §430.002(b) provides that for a construction defect to be actionable as a breach of the warranty of habitability it must have an adverse effect on the habitable areas of the home. The commission uses the term "adverse effect" in this chapter only as it relates to the warranty of habitability and the commission's use of the term tracks the statutory language.

On the definition of "builder responsibility," Eberwine suggested clarifications to the definition to make clear whether the parties' agreement to an alternative remedy could include repairs that were lower than the performance standards adopted by the commission or the International Residential Code (IRC), National Electrical Code (NEC), or manufacturer's specifications. Once the commission-adopted performance standards are effective, a builder must build to the minimum performance standard; therefore, a builder who repairs a construction defect must repair that

defect such that it at least meets the commission-adopted performance standard for that component. However, the parties to a construction dispute may agree to an alternative remedy for resolving their dispute rather than the builder making a repair to bring the construction defect into compliance with the performance standards. The commission believes that the language as written is clear and accurately expresses the commission's intent.

Eberwine suggested that the definition of "Code" as it relates to the IRC and the NEC is unclear as written because he is unsure of when the context might require reference to the NEC as opposed to the IRC. The commission finds that the definition is clear as written and declines to make changes to the definition. If the context refers to electrical matters and the reference is to the Code, it references the NEC.

The commission received comments from Eberwine, Little and TAB on whether the definition of "condition" is necessary given changes that were made during the drafting process. The commission agrees that the definition is no longer necessary and in fact may cause confusion because of the number of times in which the word is used in its ordinary meaning throughout the proposed sections. Therefore, the commission has deleted the definition.

Eberwine and representatives of BCSHA and the VBA have questioned the definitions of "Electrical Standard" and "International Residential Code." Eberwine suggested that the commission should refer to a single version of the IRC and NEC in order to promote uniformity throughout the state and BCSHA and VBA suggested that the commission refer to the state in its entirety rather than making separate statements for municipalities and unincorporated areas. Foster also commented on references to the county seat in unincorporated areas of the state because the municipality that houses the county seat may not have adopted the IRC or NEC. The commission has proposed adoption of the language mandated by Property Code §430.001, which requires that the commission standards refer to the IRC and NEC exactly as stated in the proposed definitions. Accordingly, the commission declines to make changes to these definitions.

The commission received comments from several who commented on the performance standards, including BCSHA and VBA, regarding use of the word "excessive." The commission finds that its definition of "excessive" is adequate for interpreting the proposed performance standards in which the term is used.

HADD expressed concern that the definition of "extreme weather condition" would not allow for the variety of geographical conditions in Texas. However, the IRC, which is contained in the definition, provides different standards for different geographical regions. Accordingly, no change is necessary.

BCSHA and VBA seek clarification on the definition of "habitable area," which refers to the commission's adopted definition of "living space" in 10 TAC §301.1(14). "Living space" is defined as the enclosed area in a home that is suitable for year-round residential use. The commission finds this definition self-explanatory and declines to make revisions to this section as a result of BCSHA's and VBA's comments. Stark also commented that garage and attic spaces should be included in the definition of "habitable area" to ensure that latent defects in mechanical systems in the garage and attic spaces are not excluded from the warranty of habitability. However, the commission does not agree with Stark's analysis that the proposed language would exclude from coverage under the warranty of habitability a defect which occurs in a non-habitable area of the home but which causes damage to a habitable area of the home. Property Code §430.002(b) provides that for a construction defect to be actionable as a breach of the warranty of habitability it must have an adverse effect on the habitable areas of the home. Accordingly, the commission has not made a change to the proposed text as a result of Stark's comment on this section.

Stark opined that the definition of IRC in §304.1(c)(9) lessens the minimum standard that the commission is required to adopt by inclusion of the words "substantial compliance." Further, Stark notes that the IRC states that it "establishes minimum regulations..." Stark believes that the commission "should not lessen the 'minimum standards of performance' by not requiring full compliance with the 'minimum regulations' of the IRC." The commission notes that substantial performance under a construction contract is the legal equivalent to full compliance. See *Uhlir v. Golden Triangle Development Corp.*, 763 S.W. 2d 512, 515 (Tex. App.- Ft. Worth 1988) writ denied. Accordingly, the commission declines to make the requested change. However, the commission notes that Ms. Stark made a converse argument regarding the definition of "homeowner responsibility"; therefore, the commission has added the idea of "substantial compliance" to that definition to clarify its intent.

Harwell, Foster, Eberwine and Houston commented on the definition of "major structural components." Harwell suggested that the language of the definition should be exclusive rather than inclusive as proposed. In contrast, Eberwine suggested adding expansive language "including but not limited to" and specifically listing "headers" among those items identified as major structural components. Houston recommended the addition of masonry arches to the listed items because masonry arches are of the same ilk as lintels. Foster suggested that "ceiling framing" be included as a part of roof framing systems. The commission agrees that headers, masonry arches and ceiling framing should be added to the list of structural components, but also agrees that the list of structural components should be exclusive. The text was modified to reflect the commission's evaluation of the comments.

GSABA suggested that the commission add "engineered manufactured structural components" to the definition of "manufactured product." However, the commission finds that such an addition would change the meaning of the section such that it would no longer reflect the commission's intent. The commission's reference to manufactured products applies to consumer items that are incorporated into a home with little or no change from when delivered by the manufacturer. Inclusion of the term suggested by GSABA may permit the definition to include components that are modified to fit the design of each residential construction situation.

The commission received comments from Tilson, Houston, Stark, Eberwine, HADD, Houston, Pierry and Little on the definition of "original construction elevations." Little commented that garages and outbuildings that are not part of a monolithic foundation should be excluded. The commission finds that the proposed definition, by expressly stating that actual elevations include garages and porches 'if those structures are part of a monolithic foundation,' implicitly excludes garages and porches that are not part of a monolithic foundation; thus, no change is necessary.

Several of the commenters expressed concern that the actual elevations be recorded. Of these suggestions, the commission

finds that the most practical method for maintaining the elevations would be to require the builder to keep them in the builder's file for the ten-year period of the warranty. The original homeowner might not retain the elevations or provide them to a subsequent purchaser. The commission does not have the resources to maintain elevation documentation on each home registered with the commission. Finally, it behooves the builder to maintain the original elevation records should future claims regarding the foundation be made. If the builder fails to maintain the elevations or chooses not to take the elevations, the foundation is presumed to be level at plus or minus three-quarters of an inch off level for the entire length of the foundation. Accordingly, it is in the builder's best interest to maintain the elevations. However, since there is no requirement that builders maintain the elevations, the commission has deleted that portion of the definition.

Another common concern was determining the point in construction when the elevations should be taken. The commission believes that the builder should have the latitude to determine when the elevations should be taken; thus, the elevations should be taken at anytime before substantial completion. Other comments addressed the frequency with which the elevations are taken. Also, Tilson suggested that elevations be taken at the perimeter corners of the home. However, the commission finds that taking elevations at the perimeter corners alone would not provide enough information. Pierry suggested that elevations should be taken at 'fairly regular intervals on the surface of the entire foundation at a rate of at least one elevation per 100 square feet.' Harwell offered that to establish original construction elevations the 'elevations shall be taken at an approximate rate of at least one elevation per 100 square feet, subject to obstructions.' The commission determined that Harwell's language provides the best combination of guidance and flexibility, so the definition has been changed in accordance therewith. In addition, the commission has revised the section to require that the elevations depict a reference point and a description of the floor.

Tilson suggested increasing the presumption for construction elevations to be level to one inch; however, the commission finds that plus or minus three-quarters of an inch over the length of the foundation is a reasonable presumption for levelness. A builder has the option to rely on the stated presumption or to take elevations if there is a concern that the presumption does not provide enough latitude.

On the definition of 'performance standard' Eberwine commented that the word "should" should be replaced with "must." The commission agrees and has changed the text accordingly. The commission has also added the word "component" to the definition for clarity because the term is used frequently in the performance standards to refer to an element of a home.

On the definition of 'substantial completion' Eberwine noted that in paragraph (A) using the term "earlier" could create a situation in which the warranty period has commenced, but the home has not been sold. The commission agrees that such was not the intended result and has changed the definition accordingly. Comments were also received regarding paragraph (C) from Foster, Poage and Eberwine. The suggestions included removing the language regarding the construction lender and adding the requirement that the inspection be performed by an ICC Inspector who has a combination certification. Upon reflection, the commission has determined that requiring an inspection in an unincorporated area would add an unnecessary cost to the homeowner. By deleting paragraph (C) the homeowner or the builder may choose to incur the cost for an inspection prior to closing or occupancy, but neither is required to do so.

Harwell suggested that the commission add a definition for 'structural failure.' The commission agrees that the definition would be helpful, but finds that it would be a substantial change to the proposed rules, which requires an opportunity for public comment. Therefore, the commission will adopt a definition in a proposed amendment to the commission's rule on general definitions.

Section 304.1(d) provides a method for third-party inspectors to resolve conflicts among standards. Stark, Foster and Eberwine all suggested that the commission delete the language regarding agreements between the parties because it may create greater ambiguity or provide an opportunity for lowering a standard below the standards adopted by the commission. The point is well-taken and the language has been deleted. Harwell commented that the inclusion of the Texas Section of the American Society of Civil Engineers Recommended Practice for the Design of Residential Foundations (2002) (ASCE) would cause a dramatic increase in the cost of home construction. Furthermore, these ASCE standards are not definitive, but provide construction options and are preempted by building codes and municipal inspection standards. The commission finds that Harwell's points are valid and has deleted reference to the ASCE standards in this section. However, ASCE standards are used in the proposed performance standards when the commission determined that they provided the most objective standard for evaluating an alleged construction defect. GSABA suggested the addition of the "Guidelines for the Evaluation and Repair of Residential Foundations (2002); however, the commission declines to include those standards for the same reasons it is deleting the ASCE standards in this conflicts section.

Section 304.2 provides for general provisions that relate to all new residential construction to which the commission-adopted performance standards will apply. Section 304.2(a) states builder's responsibilities, §304.2(b) states exceptions to the builder responsibilities and §304.2(c) states homeowner responsibilities. Section 304.2(a)(1) provides that the builder is responsible for all work performed under the builder's direction for the period of the applicable warranty and incorporates statutory timetables for making a request to initiate the state-sponsored inspection and dispute resolution process that is in Property Code §426.005(b). Stark expressed concern that subsection (a)(1) could be misconstrued to suggest that the warranty of habitability was only for two years. Stark suggested amendment to §304.3 to include language that the warranty of habitability is ten years. The commission has added language to §304.3 to clarify that the warranty of habitability is a ten year warranty.

Poage suggested that §304.2(a)(1) should address third-party inspections that take place prior to completion of construction and commencement of the warranty period. However, the commission-adopted performance standards are used to evaluate construction performance after the warranty period commences.

Section 304.2(a)(2) addresses a builder's responsibility regarding recommended repairs if the builder makes repairs as a result of a third-party inspector's report, or if that report is appealed, the recommendations of the appellate panel. Foster suggested that the section reference that the repair be consistent with the Code, as did Poage and Eberwine. Eberwine also suggested that the section make clear that any agreement made by the parties with regard to repair cannot fall below the strictest standard.

The commission agrees that the builder who undertakes a repair recommended by a third-party inspector pursuant to §313.14 of this title shall make the repair consistent with the Code, the performance standard or §304.2(a) of this chapter. If the inspector does not make a recommendation for repair, the builder who undertakes to make a repair shall make it in accordance with the Code or the usual and customary building practices, or as agreed by the parties, so long as any agreed upon repair does not fall below the Code or the performance standard, whichever is strictest.

With regard to §304.2(a)(3), repair condition, Eberwine suggested that the commission replace the word "cosmetic" with the word "proper". The commission declines to accept the suggestion; however, it has revised the section to better state its intent.

Section 304.2(a)(4) refers to correcting finishes after a repair. Both Harwell and Streetman suggested that the language "acceptable to the homeowner" may create unnecessary controversy and that the section could be improved. The commission accepts Harwell's suggestion to delete "acceptable to the homeowner" and add "substantially similar in appearance."

HADD expressed concern on the §304.2(a)(5) provision regarding "manufactured products" that latent defects would be excluded. However, the proposed text provides that a homeowner must notify the builder of a defect within two years of discovery or not later than thirty days following the applicable warranty period provided in §304.3(a). This section incorporates that statutory timetable for making a request to initiate the state-sponsored inspection and dispute resolution process.

Parker and Eberwine addressed §304.2(a)(6) regarding design standards. Parker interpreted the section to require homeowners to sign off on all house plans, including speculative homes. Eberwine expressed concern that the section on design standards may allow designs to fall below commission-adopted performance standards. Based on the comments the commission has decided to label this section "specialty features." The commission does not intend that homeowner's sign off on all house plans, including speculative homes. The commission's intent is to allow builders to accommodate special design features into construction that may not meet the performance standards adopted by the commission; however, even if special design features, such as rough-textured dry-wall, do not meet the performance standard for surface depressions, the wall still must be built in accordance with the Code.

Stark opined that §304.2(b), which describes exceptions and exclusions to the builder's responsibilities for repair, loss or damage to a component of a home, should track the language of the Residential Construction Liability Act (RCLA) regarding percentage of responsibility. The builder's responsibility is to repair or replace components that have construction defects that are the result of actions taken by the builder or at the builder's direction. The commission finds that the exclusions and exceptions listed in §304.2(b), as revised for adoption, appropriately limit the builder's responsibilities for repair. However, to ensure that if a portion of a component is defective, lost or damaged as a result of construction activities, the commission has revised the proposed language to include portions of a component. Foster and Eberwine suggested that builders should supply maintenance and care manuals to homeowners. The commission understands that new homeowners may not be aware of home maintenance and care requirements; therefore, the proposed sections offer maintenance information when such is necessary and adds clarity to the performance standard. Further, the commission has plans to publish maintenance guidelines to assist new homebuyers in caring for their investment.

Foster suggested that the exclusion in §304.2(b)(1)(D) for alterations to the grade of soil should be limited to alterations that are not in compliance with the IRC. Eberwine made a comment similar to Foster's. The commission agrees with Foster's suggestion and adds that the exclusion should only apply to alterations that are not in compliance with the IRC or applicable government regulations. Poague suggested that the proposed language would cause builders to fail to properly grade the soil so as not to be responsible for grading at all. However, the commission does not agree because builders are required to comply with the IRC and applicable governmental regulations when undertaking residential construction projects.

Stark commented on the exclusion for changes to the underground water table that may affect the home in §304.2(b)(1)(I). She recommended that foundations be deleted from this exclusion because a builder may argue that wet weather conditions on highly expansive clay soils is a change in the water table. Foster raised the issue of the builder's responsibility for actions taken at the time of construction that may affect the water table. Houston, Eberwine, HADD and HOBB made similar comments. The commission agrees that a change in the water table that is the result of remedial actions taken or not taken by the builder at the time of construction is a part of the builder's responsibilities.

HADD and Poage both submitted comments on the exclusion for erosion or accretion of soils that are not the result of a construction defect in §304.2(b)(1)(J). The commission declines to make a change to this exclusion. It is clear from the language of the proposed text that erosion or accretion of soils that are the result of a construction defect are the responsibility of the builder.

Regarding §304.2(b)(1)(P), Harwell stated that the exclusion for damage caused to existing trees, shrubs or other plants that result from the work necessary to construct the home is "somewhat ambiguous." Stark and Houston opined that the builder should be responsible for taking existing vegetation into account when building a home and planning the foundation. Eberwine questioned the need for such an exclusion. HADD wanted to add language "unless the builder planted them." The commission has determined that the exclusionary language is not clear and has deleted it.

Regarding §304.2(b)(1)(R), Eberwine stated that remodelers should be able to correct existing conditions that do not meet performance standards during construction so there should be no exclusion from performance standards for those that cannot be achieved as a result of pre-existing conditions. The commission does not agree because conditions may exist that prevent a remodeler from achieving certain performance standards when undertaking construction on an existing home.

Foster, Poage, HADD and Eberwine all expressed concern that if the builder is not responsible for a condition that does not cause actual physical damage as stated in §304.2(b)(2), some problematic conditions would be allow to stand uncorrected until a disastrous situation occurred. However, the proposed language provides that the exclusion does not include conditions that are the result of a construction defect. Accordingly, if the condition is a direct result of a construction defect, the builder is responsible for correcting the condition. HOBB stated that the exclusion was in violation of HUD standards, but the commission finds that those standards are not subject to exclusion.

Section 304.2(c) discusses a homeowner's responsibilities including home maintenance under §304.2(c)(1). Foster, Stark, Houston and Eberwine all provided comments on the requirements that homeowners perform periodic soil maintenance on their homes and lots under §304.2(c)(3) and all suggested that the builder has some level of responsibility for providing homeowners with guidance on maintenance. The commission agrees that soil maintenance should be covered in a maintenance guide and not the performance standards. Therefore, the commission deleted the provision.

Similar comments were provided by Foster, BCSHBA, Eberwine and HADD regarding landscape watering under §304.2(c)(4). However, the commission finds that the proposed language offers straightforward guidance regarding the need to avoid excessive moisture accumulation near the foundation and an explanation of how landscape watering may create an imbalance in moisture that could affect the foundation performance.

Harwell suggested revised language for the landscape planting provision in §304.2(c)(5) and the commission agrees with the suggested language. Therefore, the commission has modified the section in accordance with Harwell's revisions. Foster raised the issue of providing the homeowner with information on landscape planting, but the commission has addressed that issue and agreed that homeowners may need guidance. Therefore, in addition to the changes made, guidance will be provided in another document. To the extent that Foster has made a similar comment regarding other homeowner responsibilities, the commission believes the issue has been addressed. HADD raised a comment about grading as it relates to landscaping, but soil grading is addressed elsewhere in the standards.

HADD, Eberwine and Foster raised questions about how a homeowner might prevent excessive moisture accumulation as required in §304.2(c)(6). As a result of the comments, the commission has revised the section to better explain its intent that homeowners have a responsibility to recognize that there are conditions that may cause damage if left unabated and to utilize ventilation equipment as needed to alleviate those conditions.

Eberwine maintained that if a homeowner is responsible under §304.2(c)(7) for chemicals found in tap water, then the builder should provide information on the chemical content of the water. The language to which Eberwine refers was offered as explanatory and is not necessary to understand the meaning of the maintenance requirement. The commission deleted the second sentence to alleviate the problem.

Eberwine also commented on §304.2(c)(8) that the builder should also be required to take reasonable action to prevent further damage to the home under the section entitled "self-help." The commission included this section to address the issue of mitigation of damages. If a homeowner discovers that the washing machine is overflowing from the drain, the homeowner should turn off the water to prevent further damage and sop up the spillage to avoid further damage to flooring and walls. The builder cannot take action without notice of a problem. The commission finds that the section is clear and does not need revision as suggested by Eberwine.

Section 304.3, Limited Warranties, has been revised as a result of a comment made by Stark that the warranty period for the warranty of habitability was unclear. The commission has added language to clarify that the warranty of habitability is a ten-year warranty.

The commission received similar comments from VBA, BCSHBA, and Parker on §304.3(b) that the Magnuson Moss Act provides all the coverage needed to a consumer regarding the warranties on manufactured consumer products. Tilson requested the deletion of the last sentence that requires the builder to take action to correct a warrantable manufactured product if the manufacturer timely fails to take action. The commission finds that a builder is responsible for providing quality products to homebuyers. If the manufacturer fails to comply with its warranty provisions within a reasonable period of time, the builder should bring the condition into compliance with the performance standard and seek redress from the manufacturer. The builder is not required to warrant the product in any greater degree than the terms of the manufacturer's warranty under this subsection.

Harwell suggested that the language "foundations and major structural components" under §304.3(e) is redundant and that only 'major structural components' is necessary. The point is well-taken and the commission has revised the subsection accordingly.

Regarding §§304.3(f)(2) and 304.3(f)(3), the commission received comments from Harwell, TAB, Little, Poage, Stark and HADD. The language of the section as proposed incorporated the terms stated in Property Code §430.002. However, Harwell provided a suggested revision that better states the statutory requirements. The other comments received are either addressed by the changes suggested by Harwell, are covered elsewhere in the proposed sections (e.g. the definition of habitability or the length of the warranty period) or contradict the statutory provisions regarding the warranty of habitability.

Regarding §304.3(f)(4), Eberwine correctly noted that a request to participate in the state-sponsored inspection and dispute resolution process for a breach of the warranty of habitability must be made within two years of the date of discovery of the alleged construction defect but not later than "thirty days" after the effective date of the warranty period. The commission has made that correction.

Property Code §430.007 prohibits the inclusion of a provision in a contract between a homeowner and builder that would waive the limited statutory warranties and building and performance standards adopted by the commission pursuant to Property Code ch. 430 and specifically provides that the parties may contract for more stringent requirements. Although the commission received comments from Tilson and Eberwine seeking to change §304.3(i), which restates Prop. Code §430.007, the commission declines to make the suggested changes because the proposed text is substantially similar to the statutory language supporting it.

With regard to Subchapter B, the Performance Standards for Component of a Home Subject to a Minimum Warranty of One Year for Workmanship and Materials §§304.10-304.33, the commission received several comments throughout regarding the meaning of "construction activities," including comments from HADD regarding most sections in which the term is used. The commission will adopt a definition for "construction activities" in a rule amendment proposed contemporaneously with the approval of these sections to clarify that it means the actions taken by a builder or remodeler, or an employee, agent, contractor or subcontractor of a builder or remodeler, or anyone acting at the direction of the builder or remodeler during the building process of building or remodeling the home.

Section 304.10(a): Foster and Eberwine commented on the performance standard for grading in a crawl space. Both expressed concern that grading should not permit water to stand in a crawl space. The commission finds that use of the term "surface runoff" as opposed to "water" and use of the term "accumulate" as opposed to "stand" will more accurately reflect its intent. The commission agrees that grading should be such that surface runoff does not accumulate in a crawl space and that exterior drainage around a perimeter crawl space wall shall not allow water to stand within ten feet of the foundation, except in a sump that drains into other areas. The commission has determined that the provision related to exterior grading is consistent with standards used in other states. Eberwine also commented that the homeowner should be allowed to modify existing grading so long as the modifications are properly done. The commission agrees and has modified the text to reflect its agreement.

With regard to §304.10(a)(2)(B) Eberwine also commented that homeowners should be allowed to make proper modifications to grade. Again, the commission agrees and has modified the text.

The commission received comments from Foster, VBA, Poage, Bonded Builders, Tilson, Eberwine, Houston, TAB, Parker and BCSHBA on §304.10(b)(1). This proposed section provides that concrete slab floors in living spaces, excluding finished concrete floors and intentionally sloped floors, shall not have excessive pits, depressions or unevenness equal to or exceeding 3/8 of an inch in any 32 inch measurement and shall not have separations or cracks that equal or exceed 1/16 of an inch in width or 1/16 of an inch in vertical displacement. Foster, Poage and Houston complained that the standard for unevenness, at 3/8 of an inch in any 32 inches, is excessive. In addition, Houston and Poage raised a question as to whether this standard could be construed as applying to the levelness of slabs foundations. The commission finds that the 3/8 of an inch measurement in 32 inches refers expressly to issues of depressions, pits and unevenness of the surface, not levelness, which is addressed in §304.100, regarding tilt in slab foundations. The commission does not find that the measurement is too lax. VBA, Bonded Builders, Tilson, TAB, Parker and BCSHBA all noted that the standard for separations and cracks of less than 1/16 of an inch in width and 1/16 of an inch in vertical displacement is too tight and is inconsistent with related performance standards regarding flooring. VBA added that repair of a 1/16 of an inch wide crack may create more damage than allowing it to stand. Based on the fact that the proposed performance standard for a finished concrete floor prohibits a crack of less than 1/8 of an inch in width and such is the current industry standard , the commission has modified the proposed text in this section to 1/8 of an inch as it relates to the width of a crack or separation, but not as to vertical displacement. The commission finds that if a vertical displacement of 1/16 of an inch is discovered in an interior concrete slab in the first year, it should be considered a construction defect.

Within the same performance standard, §304.10(b)(3), on concrete slabs, the proposed text provides that a separation in an expansion joint or a control joint shall not equal or exceed one-quarter of an inch vertically or one inch horizontally from an adjoining section because of settlement, heaving or separation. Houston commented that the one inch horizontal separation at a control joint is excessive and added that the one-inch standard is inconsistent with other performance standards regarding horizontal displacement. Eberwine noted that the language of "settlement, heaving or separation" opens the door for conflicts regarding the reason for the displacement. First, the commission finds that control joints are rare in foundations in residential construction; therefore, it has deleted the reference to control joints in this subsection and in subsequent standards that reference control joints. Second, the commission agrees with Eberwine that the language regarding the cause for movement and deletes the reference to the cause of the separation. However, the commission finds that proposed measurements for horizontal and vertical movement at a separation joint between concrete slabs is appropriate given that the purpose of the separation joint is to allow room for movement.

Section 304.10(c) states the performance standards for exterior concrete. The commission received numerous comments on the performance standards for cracks appearing in exterior concrete flatwork as provided in §304.10(c)(2). VBA, Tilson, Parker, Streetman and BCSHA complained that the performance standards were too stringent for exterior concrete work that is exposed to the environment and that requiring performance to the stated standard would increase costs of construction. Foster, Stark and Eberwine conversely argued that the standard was too lax and that builders should be able to construct flatwork that did not have cracks 1/4 of an inch or greater within the first year. The commission finds that heretofore exterior concrete flatwork has not been warranted typically in the residential construction industry. Furthermore, exterior concrete flatwork is subject to elements, such as varied soil moisture or external pressure, that may affect its performance and requiring all exterior concrete flatwork to be constructed with reinforcement materials would increase the cost of construction. For these reasons, the commission believes that the standard as proposed provides reasonable performance for a one year period. Thus, the commission declines to make any changes to the performance standard as stated in §§304.10(c)(1)-304.10(c)(2)(B).

In §304.10(c)(2)(B) the commission has included a statement of the homeowner's responsibility of reasonable maintenance of uniform soil moisture content around exterior flatwork and also for preventing heavy equipment to be parked on the flatwork. Foster and Eberwine have taken issue with these exclusions stating that a builder should be building for given soil and weather conditions and Eberwine declares that use of the term "heavy equipment" is unclear. Little asked that the commission delete this section entirely because of the potential for heavy equipment to be placed on exterior flatwork. The commission believes that homeowners have some obligation to be aware of conditions around their homes and to maintain them by use of reasonable care. Further, the commission finds that the term "heavy equipment" is a term of art commonly used and understood in the construction industry. In addition to the comments received, commission has determined that the language in §304.10(c)(2)(C) is superfluous and has deleted this paragraph.

Houston, Eberwine and Streetman made similar comments regarding §304.10(c)(5), which addresses the performance standard for horizontal and vertical movement in expansion joints in exterior concrete flatwork as they made regarding §304.10(c)(2), which addresses horizontal and vertical cracks in exterior concrete. Streetman stated that expansion joints are incorporated into flatwork to permit movement between the slabs and that at least a one-half of an inch horizontal displacement rather than one-quarter of an inch should be allowable. Foster recommended that the commission reduce the proposed performance standards to one-quarter of an inch vertical separation and one-half of an inch horizontal separation. Foster based his recommendation on ACI standards and "old FHA and VA Minimum Property Standards." Foster also noted

that ergonomic studies regarding walking and climbing stairs and the IRC standards for stair variations. The proposed performance standards in this section do not include exterior stairs, which are addressed elsewhere. The commission again bases its performance standards for exterior flatwork on the fact that exterior flatwork has previously was not included in warranties for residential construction and that exterior flatwork is subject to external elements that affect its performance to a greater degree than interior concrete. Further, with regard to expansion joints, the purpose of the joint is to permit movement in recognition of the external elements that can cause exterior concrete surfaces to move. Therefore, the commission declines to accept any of the suggested changes to the performance standards in this section.

Section 304.10(c)(6) provides a standard of performance for vertical and horizontal separations at control joints in exterior concrete flatwork. Eberwine, again, suggested deleting the portion of the standard that refers to cause for separation. For the reasons stated above, the commission agrees and changes the language accordingly.

Foster and Eberwine provided comments on the performance standard for separation of exterior concrete stairs from the home in §304.10(c)(9). Eberwine reiterated his suggestion that including a statement regarding cause for separation from the home would cause unnecessary debate and the commission agrees. Foster stated that the proposed one-inch tolerance was too great. The commission has determined that one inch is appropriate but that to improve clarity the paragraph needs modification to provide that the measurement includes any joint material.

Section 304.10(c)(11) addresses depressions, pits, unevenness and separations or cracks, not at expansion joints, found in concrete floor slabs that are not included in living spaces, but in detached garages, carports and porte-cocheres. Stark's comment demonstrated that the standards as proposed were not clear with regard to garages that are not a part of a monolithic slab. Accordingly, the commission added the term "detached" before "garage" to provide clarity. Although Tilson commented that the tolerance of less than 3/16 of an inch in the width of cracks and separations is too small, the commission is satisfied that the performance standard proposed is not too small for a one year warranty period if the problem is one of workmanship and materials.

HADD noted that the proposed performance standards for exterior concrete do not include the construction of a driveway that is too steep. The commission considers this to be a design issue and not a performance issue.

Section 304.11 sets forth performance standards for framing. Subsection (a) provides that a wall shall not bow or have depressions that equal or exceed *1/4 of an inch out of line with any 32-inch horizontal measurement as measured from the center of the bow or depression or 1/2 of an inch in any eight-foot vertical measurement. VBA, Parker and BCSHBA all asserted that the "National Guideline" is that a wall shall not have bows or have depressions that are "greater" than 1/2 of an inch in any eight foot measurement. The "National Guideline" to which they refer is the National Association of Home Builders (NAHB) guidelines. In arriving at the proposed standards and allowances for performance the commission has tried to balance the competing interests of homebuilders for keeping costs low and the interests of homebuyers to purchase a well-built home that functions as intended and that is aesthetically pleasing. The commission has determined that a better standard for framing is that the measurement should be less than 1/2 of an inch; therefore, it declines to make the suggested change.*

Section 304.11(a)(2) states that walls must be level, plumb and square to all adjoining openings or other walls within 1/4 of an inch in any 32-inch measurement. VBA, Parker and BCSHBA again refer to the NAHB guidelines and suggest that the appropriate standard should be "equal to or greater than 3/8 of an inch in any 32-inch measurement…" Foster avers that the IRC standard for wood frame construction is a maximum out-of-plumb at 3/4 of an inch in an eight-foot measurement and that changing the standard to 3/8 as suggested would exceed that maximum standard. Houston maintains that the proposed variance for plumb at 1/4 of an inch in 32 inches is excessive and should be considered a poor construction practice. The commission finds that the current standard is actually 3/4 of an inch in a 32-inch measurement; therefore, the commission agrees with the builder representatives that the 1/4 of an inch standard is too tight. Accordingly, the commission has revised the standard to "within 3/8 of an inch in any 32 inch measurement…"

In §304.11(a)(3) provides that a crack in a beam or post shall not equal or exceed 1/2 of an inch in width at any point along the length of the crack. Foster suggested adding the language "or it is determined that the beam or post is no longer capable of carrying its design loads." The commission agrees that it is paramount in framing that a beam or post be able to carry its design loads and that the failure to do so would be a construction defect. Foster's suggestion addresses the concern raised by Eberwine that a beam or post must function as intended. Also, several builder representatives (VBA, ADB and Parker) pointed out that the appropriate terminology is beam or post and not "post and beam," which is a framing detail.

HADD commented that the language in §304.11(a)(4)(B) appeared to create an excuse for warped beams and posts because it notes that posts and beams are subject to drying and cracks may result. The commission has determined that such explanatory information is superfluous to the performance standard and therefore, that language has been removed.

Section 304.11(a)(5) provides that exterior sheathing shall not delaminate or swell. Tilson called into question use of the term "sheathing," which is a material applied to the exterior of the home for bracing or insulation and suggested that the correct term should be "siding." Eberwine suggested that the proposed remedy should be worded to provide that if the sheathing failed to meet the performance standard the builder shall "replace the sections [affected.]" With regard to both comments, the commission finds that the section accurately expresses the performance standard as the commission intended. Accordingly, the commission made no revisions as a result of these comments.

Section 304.11(b) states the performance standards for ceilings. Subsection (b)(1) provides that ceilings shall not bow or have depressions equal to or exceeding 1/2 of an inch out of line within a 32-inch measurement as measured from the center of the bow or depression running parallel with a ceiling joist. Foster and Eberwine both suggested that the standards should not allow a bow or depression to equal or exceed 1/4 of an inch in a 32-inch measurement. Foster also felt that the standard is inadequately defined for an inspector to know how to take such a measurement; however, he offered no alternative language.

The commission has determined that the ceiling standard for framing is the same as the ceiling standard for ceilings constructed of drywall and that the standards of both as proposed is appropriate and acknowledges the difference between construction of a ceiling and construction of a wall. With regard to the method of measurement, the commission has made the standard more clear by stating that the measurement shall be from the center of the bow or depression running parallel with a ceiling joist or within 1/2 of an inch deviation from the plane of the ceiling within any eight-foot measurement.

Section 304.11(c) states the performance standards for sub-floors. Eberwine took issue with including a statement of cause for floors that emit excessive noise during normal residential use in subsection 304.11(c)(1) and 304.11(c)(1)(A). The commission agrees and has revised the standard. For subsection 304.11(c)(2) regarding damage to the subfloor as a result of delamination or swelling, Eberwine suggested the addition of "or can be felt through the floor covering when walked upon." However, the proposed text provides that delamination or swelling of the subfloor should not result in "observable physical damage" to the floor covering. The commission believes that use of the term "observable" encompasses observation as a result of use of any of the senses. Foster recommended that the standard for ridges and humps in subfloors, which is proposed to be less than 3/8 of an inch in any 32 inch measurement, should be 1/4 of an inch in any ten foot measurement. The proposed standard for subflooring is consistent with the proposed standard for floor coverings. The commission has relied on the input of TAMU in developing standards that offer the homebuyer sound construction without unnecessary or prohibitive increases in cost. This proposed standard achieves the commission's goal and thus will not be changed as a result of Foster's comment.

Section 304.11(d) includes performance standards for stairs. Poage and Eberwine both provided comments on the language used to describe the standard for excessive noise resulting from stairs subjected to normal residential use. Eberwine again commented on the issue of cause "directly attributable to loose stair treads or framing" and the commission agrees with his comment. Poage commented that requiring the builder to bring stairs that make excessive noise to within the stated standard creates a loophole, because the builder should bring the stairs to within Code. The overall requirement for performance presumes that construction is built at least to the applicable Code; therefore, there is no need to alter the standard as proposed.

Section 304.12 states the performance standards for drywall. Subsection (a) states the standard for bows and depressions; subsection (b) states the standard for ceilings made of drywall; subsection (c) states the standard for cracks in drywall; subsection (d) states the standard for crowning in drywall; subsection (e) states the standard for ridges and beads appearing at drywall joints; subsection (f) states the standard for drywall surface imperfections, such as blisters and trowel marks; subsection (g) states the standard for levelness of a drywall surface; and subsection (h) states the standard for the visibility of nails or screws in a drywall surface. Although the commission received comments from VBA, GSAB, Parker, BCSHBA, Tilson and ADB suggesting that the standard in subsection (a) that a bow or depression in a drywall surface shall not equal or exceed one-quarter of an inch out of line within any 32-inch horizontal measurement or one-half of an inch in any eight-foot vertical measurement, is too stringent as compared to the NHAB guidelines. The standards stated for walls and ceilings constructed with drywall in subsections (a) and (b) are consistent with the standards stated for framing in §304.11. For the same reason the commission declined to make changes to the proposed standards for wall and ceiling framing based on the NHAB guidelines, the commission declines to make those same suggested changes for walls and ceilings constructed of drywall.

Foster and Eberwine made suggestions for revising the proposed text in subsections (a) and (b) that they thought would clarify the text. However, the commission does not find that the suggestions of either offer any clarification to the commission's intent, so the commission declines to accept the suggestions.

On subsection (b) regarding ceilings, Foster also expressed concern that the proposed standards would permit deflection of the ceiling up to two and a quarter inches in a twelve-foot room. The commission believes that if each measurement is taken in accordance with the language in the proposed text, drywall ceilings that are performing as proposed will not have bows and depressions that allow the ceiling to deflect from one end of the room to the other to a degree of two and a quarter inches.

Comments from builder representatives, including VBA, Tilson, Parker, Lennar and BCSHBA all protest that the performance standard that does not permit cracks equal to or greater than 1/32 of an inch during the one year warranty period for workmanship and materials is rigorous and that a better standard would be one-sixteenth of an inch. Conversely, Eberwine stated that any crack appearing in drywall during the first year is too great. Stark concurred with the commission that the proposed standard is reasonable. The commission having evaluated these comments concludes that the standard as written is reasonable when balancing the competing interests of consumers and the construction industry.

Section 304.12(d) provides that crowning at a drywall joint, which is when the drywall joint is higher than the plain of drywall board on either side of the joint, should not equal or exceed one-quarter of an inch within a twelve-inch measurement centered over the drywall joint. Foster declared that the performance standard should be one-sixteenth of an inch in the same measurement because anything as large as one-quarter of an inch is a "bulge." He further stated that the gypsum industry standards are less than one-quarter of an inch. Section 304.1(c) provides a method for resolving conflicts among standards. If the manufacturer's standard is more stringent than the performance standard adopted by the commission, the more stringent standard applies. Eberwine expressed concern that this standard for crowning at drywall joints would permit a bumpy surface of one-quarter of an inch bumps at every drywall joint when measured perpendicular to the surface. However, the commission finds that with the other standards for drywall surfaces, the drywall surface standards should achieve aesthetically acceptable uniformity for walls and ceilings covered in drywall. GSABA suggested that the standard could be made better by adding an exception for corner beads, which are designed to be embedded in a coat of drywall compound because different manufacturers' products vary at the level that they protrude. GSABA and BCSHBA suggested that crowning along corner beads should not equal or exceed three-eighths of an inch within any twelve-inch measurement. The commission concurs with the GSABA and BCSHBA comments and has revised the proposed standard to incorporate the suggested language.

As a result of Eberwine's query as to how one would reconcile subsection (e) regarding ridges along drywall joints and subsection (d) regarding crowning, the commission has reconsidered the need for subsection (e) as proposed and has deleted it.

In several of the performance standards proposed, the commission received various comments from builder industry representatives regarding use of the term "natural light" rather than "normal light." Those providing comments noted that because of the variety of lighting conditions that may exist from home to home, it is better to consider each alleged defect in the lighting conditions normal for that particular home, rather than "natural light," which suggests sunlight. The commission agrees with these comments and has replaced "natural light" with "normal light" throughout the standards. Eberwine suggested that in addition to changing the visibility standard for surface imperfections regarding lighting that the surface should be viewed for imperfections from a distance of two feet as opposed to six feet. The commission finds that the standard is intended to promote an appearance of overall uniformity of a surface and that six feet is a more reasonable distance from which to view a surface and gauge the overall appearance. Accordingly, the commission has not reduced the distance from which a drywall surface should be viewed for uniformity.

Foster, Little and TAB commented that §304.12(g) regarding the levelness, plumbness and squareness of a drywall surface, should read "shall *not* be out of level" and Tilson made a similar comment as a result of an accidentally omitted "not" in the sentence when published. This was an inadvertent error and a correction notice was published by the commission in the October 29, 2004 issue of the *Texas Register* as noted above. GSABA and BCSHBA averred that the standard should be deleted because it was already addressed in other standards; however, the commission finds that this is a necessary standard to address the performance of a drywall surface. Eberwine raised an important issue with regard to remodeling existing homes in which the pre-existing conditions may make compliance with this performance standard difficult. He suggested that in order to qualify for the exclusion for pre-existing conditions that do not meet the standard, the builder or remodeler must notify the homeowner prior to the commencement of work that the standard cannot or will be difficult to achieve. Eberwine's point is well-taken; however, some conditions may not be apparent prior to the commencement of work. Therefore, the commission has modified the section to incorporated Eberwine's notice of notice, but has revised it to reflect that construction may have commenced. Eberwine suggested that the commission expand the performance standard regarding visibility of nails or screws in drywall surfaces by adding that nail or screws should not create depressions or outlines that are visible in drywall surfaces. However, the commission finds that the issues raised by this comment are addressed by other performance standards regarding drywall performance.

Eberwine offered additional language for the performance standard for insulation under §304.13(a) to make clear that insulation must be installed in accordance with building plans and the Code. Further, he provided language to address that the absence of insulation in unheated and non-air-conditioned areas of the home may affect the performance in heated and cooled areas. Eberwine also suggested that the term "restricts" is better than "blocks" when discussing the impairment of a soffit vent by insulation. The commission adopted the substance of Eberwine's suggestions in this section but not the precise language. Tilson suggested that the commission refine the language regarding gaps between batts of insulations or adjacent framing by including a measurement of three-eighths of an inch as the maximum allowable gap. The commission has determined that 1/4 of an inch is a better standard and has made clear that there is an allowable gap between batts but no allowable gap between a batt and a framing member. By adding the measurement between batts, the standard now addresses the concern stated by Lennar that the standard would effectively eliminate the use of batt-type insulation.

Section 304.14 addresses various performance standards for exterior siding and trim. More than one comment was received regarding the different performance standards that may be affected by the use of natural wood siding as opposed to a manufactured siding product that has uniformity. The commission considers natural wood siding to be a specialty feature that should be addressed per contract specifications, including the fact that natural wood varies and has imperfections that are natural characteristics of wood. The performance standards for exterior siding presume the use of a manufactured siding product that has greater uniformity from piece to piece. VBA and Parker maintain that the requirement that siding be equally spaced and aligned such that it shall not be more than one-quarter of an inch off parallel with the adjacent course of siding from corner to corner is too rigid a measurement. Eberwine's comment indicated that he did not understand the meaning of the terminology "corner to corner" as used in the proposed standard. However, the commission does not find that the standard is too difficult to achieve or that proposed standard is unclear because by referring to the adjacent course, the standard makes clear that the measurement is relative to the abutting course of siding at a corner.

In §304.14(a)(3), the proposed performance standard does not permit nails to protrude from the finished surface of siding, unless such is within the manufacturer's specifications for installation. The commission has revised the section to make more clear that if nail heads are visible it must be in accordance with manufacturer's specifications by adding language to §304.14(a)(3) and deleting §304.14(a)(3)(B). Eberwine commented that the cure for siding that exhibits nail stains should be to replace the siding nails. However, the commission believes that the suggested remedy would cause more damage to the siding than alleviating the rust condition.

Section 304.14(a)(6) states that siding shall not delaminate or cup in an amount equal to or exceeding one-quarter of an inch in a six foot run. Eberwine suggested that the more appropriate standard would be that siding shall not delaminate or cup at all. ADB suggested that the measurement should be one- quarter of an inch in a 32 inch run. The commission finds that the proposed standard achieves the best balance between adequate performance and cost to construct to the standard. However, the commission has separated the two standards for delamination and cupping to improve clarity.

Similarly, the commission has proposed that siding shall not have cracks or splits in an amount equal to or exceeding one-eighth of an inch in width. ADB suggested that the appropriate standard would be one-quarter of an inch, which the commission finds is too great, and HADD suggested that siding should not have splits or cracks of any size, which the commission finds too rigid. Accordingly, the commission has not revised this section as a result of the comments received.

Subsection (b) of §304.14 addressed the performance of exterior trim. Eberwine professes that trim joints shall not have any separation and should not be caulked. Construction costs outweigh the benefit of permitting a small separation that is caulked and further joints may experience expansion and contraction depending upon weather conditions. Stark had issues with requiring caulk between trim and regularly shaped masonry units such

as brick. However, the joints between trim and masonry surfaces are addressed in the performance standards related to masonry.

The commission received comments from stakeholders on several of the subsections related to the performance of exterior trim that suggested that the measurements proposed for cupping, warping, cracks or splits should be larger or smaller depending upon the alignment of the stakeholder. However, upon review, the commission finds that the measurements it has proposed for performance standards are neither too difficult to achieve nor too lax a standard. In reaching this conclusion the commission has considered the potential additional cost for construction, the reasonable expectations of the home buying public for the performance of a well-built home within the first year. Like the performance standards for the visibility of nails from the finished surface of exterior siding, nail heads shall not protrude from the finished surface of exterior trim, although the presence of the nail may be detectable on some products. Likewise, if trim shows a nail stain, the builder must alleviate the stain. Accordingly, the commission has not revised the performance standards proposed for exterior trim as a result of the comments received from Eberwine, ADB, Streetman and BCSHBA.

Section 304.15 and its subsections address the performance standards for masonry, including brick, block and stone. Subsection (a) provides that a masonry wall shall not bow in an amount equal to or exceeding one inch in any eight-foot length when measured from the base to the top of the wall. Houston and Eberwine both asserted that the standard would allow a wall in excess of eight feet high to bow excessively. As a result of these comments, the commission has revised the stated standard to provide that a masonry wall may not bow in an amount equal to or exceeding one inch when measured from the base to the top of the wall. Subsection (c) provides that masonry mortar shall not have cracks that equal or exceed one-eighth of an inch in width. VBA, Parker, Lennar and BCHSHBA opined that a more realistic measurement for masonry mortar cracks would be 3/16 of an inch. HADD, Eberwine and Houston all asserted that one-eighth of an inch was too great. HADD's comments indicate that it is not differentiating between cracks in mortar and cracks in the brick unit. However, the performance standard addresses masonry mortar and mortar shrinks as it cures. As a result of shrinkage, mortar may exhibit superficial cracking that does not affect the integrity of the structure. Therefore, the commission declines to either increase or decrease the proposed performance standard.

Section 304.15(d) states that masonry units and mortar shall not deteriorate. Although Houston, Eberwine and HADD expressed a variety of concerns ranging from how to determine the quality of the brick unit installed to addressing the performance of the moisture barrier that is behind masonry, the commission finds that this performance standard is clear and expresses the appropriate expectation for masonry unit and mortar performance.

In like fashion to §304.15(d), §304.15(e) states that masonry shall not have dirt, stain or debris on the surface as a result of construction activities. Again, the commission believes that the performance standard as stated is reasonable and sets a clear expectation. Although, Baker suggested that the performance standard should state the method for removing dirt, stain or debris, the commission prefers that the builder determine an acceptable method to bring the masonry to within the expected performance standard and that the remedy may depend upon the cause of the failure to perform.

Section 304.15(f) as proposed set forth the performance standards for gaps between masonry joints. All of the comments received on this section indicated confusion and consternation with the commission's intent. The confusion expressed is understandable because the commission intended to refer to gaps between masonry units and adjoining surfaces, which is addressed in the next subsection. Therefore, the commission has deleted this subsection.

Gaps between masonry units and adjacent materials shall not equal or exceed one-eighth of an inch and all such gaps shall be caulked. The comments of VBA, Tilson, Parker, Lennar, Eberwine and BCSHBA all addressed the differing expansion rates between adjacent surfaces and that various textures may have gaps greater than one-eighth of an inch. All except Eberwine offered that the appropriate measure for such a gap should be less than one-quarter of an inch in average width. Eberwine included that the gaps need to be caulked as a moisture barrier. The commission agrees and has revised the standard to provide that gaps between masonry surfaces and adjacent materials must be caulked and less than one-quarter of an inch.

Section 304.15(h), now §304.15(g), provides that mortar shall not obstruct functional openings, such as weep holes, vents and plumbing cleanouts. Foster suggested that the commission delete weep holes from this standard and VBA, Parker, BCSHBA, Lennar and GSABA contend that masons cannot avoid getting mortar in weep holes. However, the purpose of a weep hole is to create a functional opening for the release of moisture; accordingly, the commission has not revised this section.

Section 304.16 provides performance standards for stucco. Subsection (a) allows that a stucco surface shall not be excessively bowed, wavy or uneven. As a result of a comment received from Eberwine the commission has revised the section to read "stucco surfaces" rather than "a stucco surface". Subsection (c) addresses cracks that may appear in a stucco finish. Cracks that do not equal or exceed one-eighth of an inch in width at any point along the crack do not violate the performance standard in subsection (c). Both Eberwine and HADD protested the allowance of any cracks in a stucco surface within the one-year warranty. However, cracking does occur as a result of normal shrinkage and curing; thus, the commission finds that the performance standard as proposed is reasonable. Nonetheless, the commission has deleted the explanatory language in paragraph (2) of subsection (c), because, as with other explanatory notes offered throughout the proposed text of the performance standards, the standard speaks for itself and a defect that fails to meet the performance standard is covered by the applicable warranty.

Eberwine suggested that the commission add the word "visibly" and delete the word "excessively" in the stucco performance standard that prohibits excessive deterioration of stucco. However, the commission finds that the performance standard as proposed adequately expresses the commission's intent.

Subsection (h) of the performance standards on stucco provides that a gap between stucco joints shall not equal or exceed 1/16 of an inch in width. VBA, GSABA, Parker, Streetman, ADB and BCSHBA all protested the performance standard set at less than 1/16 of an inch, preferring instead that the commission adopt the NAHB standard of 1/8 of an inch. The commission declines to adopt the NAHB standard, which the commission as determined is insufficient for first year warranty expectations. Bonded Builders pointed out that the term "gap" is imprecise when referring to an intentional joint placed to allow for expansion and contraction of the stucco surface. The commission agrees and has revised the section to provide that "separations" at joints

must meet the stated standard. The commission made this same correction in subsection (i), which refers to separations between stucco and adjacent materials.

Subsection (j) states that stucco shall not be allowed to obstruct a functional opening, such as a weep hole, a vent or a plumbing cleanout, much like the performance standard for masonry mortar. Eberwine suggested that the commission should add "or other weep hole areas," but the commission does not see that such an addition would be particularly helpful. Eberwine also suggested that the commission add a section providing that "all stucco wall sections shall be constructed so that there is a functional 'weep area' at the base of the stucco wall section." The commission is adopting performance standards and not stating construction requirements as are already covered by the IRC or manufacturer installation specifications.

Subsection (k) addresses the minimum screed clearance for stucco. The commission had proposed that the screed have a minimum clearance above soil or landscape surfaces of eight inches and that it have clearance above other surfaces of at least two inches. Eberwine suggested that the clearance over soil should be four inches, as did Henderson. Foster suggested that requiring eight inches of clearance would increase the required elevation of foundations. The commission reviewed the 2000 IRC and the 2003 IRC for stucco and reviewed the 2000 and 2003 IRC for Exterior Installation Finish Systems (EIFS). Although the 2000 IRC stated no clearance standard for stucco, the 2003 requires a minimum clearance of four inches above soil and a minimum of two inches above paved surfaces. For EIFS, the 2000 and 20003 versions require a six inch clearance for paved and unpaved surfaces. Therefore, the commission is revising subsection (k) to require that stucco screed clear soil or landscape materials by four inches and paved surfaces by two inches. Further, the commission is adding a section for EIFS that screed clearance be at least six inches above paved or unpaved surfaces.

Section 304.17 sets out the performance standards for roofs. HADD commented that the section does not include a requirement for attic ventilation. However, attic ventilation is required by the IRC and the performance standards do cover blocked ventilation. Accordingly, the commission declines to make the requested change. This section also contains a specific exclusion for failure of roof performance as a result of extreme weather. HADD protests the inclusion of this exclusion on the basis that it believes the term "extreme weather" is inadequately defined. Poage made a similar comment about use of the term "extreme weather" in this section. The commission has determined that the IRC incorporates applicable construction requirements for weather conditions that can be expected to be the norm in different geographic regions. Builders are required to construct to the IRC specifications applicable to the region in which the home is built. Therefore, again, the commission believes that use of the term "extreme weather" as it has been defined by the commission conveys adequate information for its intended purpose.

In §304.17(h), which refers to damaged roof tiles, the commission included the term "chipped." Parker, VBA and ADB all noted that if a tile is cracked or broken, it is also "chipped" to the degree that structural integrity might be compromised, but that a roof tile may have an insignificant "chip" that neither impairs aesthetics nor functionality. The commission agrees and has revised this subsection accordingly.

Section 304.17(i) provides that objects designed to penetrate a roof placed within a roof valley centerline require "cricketing" or other Code-approved water diversion methods. Eberwine suggested that the commission specify that such objects placed within a twelve-inch distance of a roof valley centerline require Code-approved water diversion methods, but also suggested that the term "cricketing" be removed. The commission finds that the standard is clear as proposed.

Eberwine also commented that roofs should not allow water penetration, regardless of reason, as implied in subsection 304.17(j). The commission concurs and has revised the section as a result of the comment.

Section 304.18 includes performance standards for doors and windows. HADD noted several possible construction defects for doors and windows that it felt were not addressed by §304.18. However, after reviewing the listed items, the commission believes all the possible conditions are covered elsewhere, either in the IRC or in the proposed performance standards.

Throughout the performance standards, and in this section on windows and doors, the term "excessive" is used to describe conditions outside the norm. The term is defined and the commission finds that, as defined, the term adequately explains the commission's meaning when it has used the term in the performance standards. Tilson suggested that the commission should include a statement as to normal condensation in explanation of the performance standard stated in subsection (a)(2) that closed doors and windows should not allow excessive moisture. The commission has not made a change as a result of the comment because the suggested language does not add meaning to the standard as proposed.

Section 304.18(a)(3) states that window and door glass shall not be broken as a result of construction activities. Similarly §304.18(a)(4) provides that window and door screens shall not be torn or damaged as a result of construction activities. Bothell expressed concern that if such a defect was not noted when the home was transferred from the builder to the buyer, the buyer may claim that damage caused by the homeowner should be repair by the builder. HADD expressed concern that glass may crack due to stress and that the use of the phrase "due to construction activities" might preclude an appropriate repair. As discussed above, "construction activities" are those actions taken by or at the direction of the builder or its employees, agents or subcontractors. The commission believes this phrase as it is used in this section and other proposed performance standards provides adequate coverage for the builder from unscrupulous homeowners and for the homeowner for defects resulting from the builder's actions.

Section 304.18(a)(6) assures that door and window locks and latches shall close securely and shall not be loose or rattle. Although Eberwine suggested different language for this performance standard, the commission finds that its proposed text offers the same standard that doors, windows and their hardware shall close securely and shall not be loose or rattle.

In the remainder of §304.18(a), the commission received comments on proposed explanatory language and maintenance suggestions. The commission has deleted these subsections for the reasons stated earlier on similar proposed sections.

Subsection (b) of 304.18 addresses performance standards for windows. HADD offered a list of possible defects that the commission could add. The commission believes that all of the situations described are covered by currently proposed sections.

Subsection (c) of 304.18 provides performance standards for doors of various types. Section 304.18(c)(1) states that sliding doors and door screens shall stay on track. VBA, GSABA , BC-SHBA and Parker all suggested that the performance standard would be better stated if it made clear that the performance expectation is for sliding doors and screens in normal use. However, all of the standards presume conditions of normal residential use.

With regard to the clearing of the bottom of an interior door and the floor, as set forth in §304.18(c)(2), VBA, GSABA and Parker suggested that the commission refer to the original floor covering as opposed to the floor. The commission agrees that if a party adds a new floor covering after the builder has installed flooring, the resulting decrease in space may not be adequate and may create a situation in which the space between the door and the floor no longer meet the performance standard. Accordingly, the commission has revised the subsection as suggested. Eberwine offered that the commission should add the requirement that the space should meet the measurement standards or "as required to maintain proper air flow…" However, the suggested language would add an unacceptable element of uncertainty and subjectivity into an objective standard that the commission declines to adopt.

Section 304.18(d) sets forth performance standards for garage doors. Tilson and Stark both sought clarification for §304.18(d)(2) to be assured that the standard as written could not be read to require the installation of garage door openers. The commission's intent was to state a standard for operability if a garage door with opener is installed. Therefore, the commission has revised the section to clarify that intent.

The commission has also reduced the allowance for a gap around a garage door from 3/4 of an inch to one-half of an inch to address consumer concerns voiced in comments received.

For §304.18(d)(5), Eberwine suggested that the commission add language regarding the operation of the garage door, including that the door shall remain in place at any open position and that the door shall operate smoothly and without interruption. The commission finds that the suggested changes will improve the standard, so has revised the sections accordingly.

Section 304.19 lays out the performance standards for interior flooring other than finished concrete floors, which are addressed in §304.19(c) of this section. Stark offered improved language for the performance standard stated in §304.19(b) regarding carpet. The commission agrees that the suggested language that carpet "lay flat and be securely fastened" not only improves subsection (b)(1) but eliminates the need for (b)(2) and (b)(3). The commission made those changes and thereby addressed issues raised by others regarding subsection (b)(2).

Section 304.19(c)(1) states that finished slabs that are located in living spaces that are not otherwise designed for drainage shall not have pits, depressions or unevenness that equals or exceeds 3/8 of an inch in any 32 inch measurement. Although several builder representatives raised the question of an exception for specialty features that may incorporate pits or depressions, the commission finds that the exclusion contained in subchapter A for specialty features addresses the issue of intentionally incorporated pits, depression or unevenness.

Section 304.19(c)(2) provides that finished concrete floors in living spaces shall not have cracks or separations equal to or in excess of 1/8 of an inch in width or 1/16 of an inch in vertical displacement. Tilson suggested that the 1/16 of an inch standard for vertical displacement should be changed to 1/8 of an inch to match the standard for concrete slabs in living spaces that are not the finished floor surface. The commission disagrees because concrete slabs that are covered by another floor covering can have a greater allowance because of the buffer of the floor covering. Eberwine and HADD both expressed concern that the 1/8 of an inch width for cracks or separations is too great. However, the commission finds that the standard is reasonable for the properties inherent in concrete.

Section 304.19(d) sets forth the performance standards for wood flooring. Several commenters noted that the proposed standard for humps and ridges in finished wood flooring does not correspond with the standard for subflooring. Many also pointed out that distressed wood floors are currently in vogue and often do not meet this standard as a specialty feature. All suggested that the standards should be the same. The commission concurs and has changed the text to provide that wood floors should not have unevenness, humps or depressions that equal or exceed a measurement of 3/8 of an inch in any 32-inch direction within any room.

In §304.19(d)(3), the stated performance standard is that wood flooring shall not have open joints or separations that exceed 1/8 of an inch. Eberwine and HADD have suggested that 1/16 of an inch is a more appropriate standard. However, the commission has determined that due to the properties of wood flooring when exposed to varying degrees of humidity, 1/8 of an inch is a better standard.

Section 304.19(d)(3)(B) on wood flooring also provides an exclusion from the performance standard for non-hardwood species that contain greater moisture and may shrink after installation and structural wood flooring that has been designed to serve as the finished floor. The standard contains a caveat that the builder must inform the homebuyer of the peculiar characteristics of this type flooring. Eberwine suggested that the caveat also include that the builder must provide the homeowner this information prior to contract signing. The commission agrees that this is a good addition to the proposed text.

Section 304.19(e) states the performance standards for vinyl flooring. Paragraph (1) provides that vinyl flooring must be installed square to the most visible wall and shall not vary by 1/8 of an inch or more in any six-foot run. VBA, Parker, Lennar and Stark all recommend that the measurement should be a 1/4 of an inch in a 32-inch horizontal measurement because the allowance for a bow in the wall is 1/4 inch in any 32 inch horizontal measurement. Since the vinyl flooring is likely to be measured from the wall, those commenting suggest that the standard should be the same. Miller states that the industry standard for installation is that the flooring is to be square with the longest wall. Tilson and Streetman both recommended that the measurement should be greater than 1/4 of an inch in a six foot run, 3/8 and 1/2 of an inch respectively. The commission agrees that the wall bow standard will affect the measurement for the vinyl flooring, so it has revised the standard to comport with the wall bow standard. However, the commission believes that it is more aesthetically pleasing to square the flooring with the most visible wall and not the longest.

With regard to pattern alignment in vinyl flooring, the commission standard is that the pattern shall be aligned in an amount less than 1/8 of an inch. Eberwine suggested that the standard should be 1/16 of an inch, but the commission has determined that the 1/8 standard is more reasonable.

The commission has also determined that vinyl flooring shall not have depressions equal to exceeding one-half of an inch in any six-foot run. Although several commented that the vinyl flooring standards should be the same as the concrete slab standard for the depth of depressions, the commission does not agree. Subfloors of concrete can accept a leveling compound prior to the floor covering that will reduce the degree of depressions in the surface. For that reason, the commission declines to accept the suggestions of VBA, Parker or Stark regarding §304.19(e)(4).

Finally, with regard to vinyl flooring, §304.19(e)(10) provides that a seam in vinyl flooring shall not have a separation that equals or exceeds 1/16 of an inch in width. It further provides that where dissimilar materials abut vinyl flooring, the gap shall not equal or exceed 1/8 of an inch. Eberwine asserts that there should be no separation at seams in vinyl flooring and that gaps adjacent to dissimilar materials should be 1/16 of an inch. The commission disagrees because the suggested installation standards would have an impact on affordable housing unequal to the benefit.

Section 304.20 contains the performance standards for hard surfaces, including ceramic tile, flagstone, marble, granite, slate, quarry tile, finished concrete or other had surface materials. Subsection (a) discusses the performance standards for these materials generally, regardless of their application. Paragraph (1) of subsection (a) provides that construction activities shall not create cracked or broken hard surfaces. Eberwine suggests that the commission add language specifically addressing the instance of poor surface preparation, but the commission does not agree with the suggestion. Although poor substrate preparation may be a factor that causes broken or cracked hard surfaces, it is not the only cause of such a construction defect.

Subsection (a)(6) of §304.20 address the displacement at a joint between two adjacent hard surfaces and sets the performance standard at not greater than 1/16 of an inch. GSABA, Lennar and BCSHBA expressed concern that trim pieces adjacent to hard surfaces would vary greater than 1/16 of an inch. The commission agrees and adopts the revised language offered.

Subsection (a)(8) provides that hard surface countertops must be level to within 1/4 of an inch in any six-foot run. Although Tilson asserted that the standard was too stringent, the commission finds that it is readily achievable.

Section 304.20(c) has the performance standards specifically for concrete countertops. Paragraph (1) states the standard for pits and depressions that shall not equal or exceed 1/8 of an inch in any 32-inch measurement. Paragraph (2) states that such countertops shall not have cracks or separations equal or exceeding 1/16 of an inch in width or 1/64 of an inch in vertical displacement. Tilson commented that the standards should allow depression of up to 1/4 of an inch and cracks of 1/8 of an inch and displacement of 1/16 of an inch. HADD conversely suggested that concrete countertops should have no cracks. The commission's proposed standard acknowledges that concrete is subject to minor cracking, but it also recognizes that concrete countertops as easily poured and leveled. Therefore, the commission has not revised the standard as a result of the comments received.

Tilson pointed out that there is no need for §304.20(c)(6) regarding the levelness of a concrete countertop because the issue is covered by §304.20(a)(8), which expresses the same standard for hard surfaces, including finished concrete. The point is well-taken and the commission has deleted the duplicative section.

Section 304.21, which addresses performance standards for painting, staining and wall coverings has been revised to reflect comments already discussed, such as the definition of the term "excessive," use of the term "normal light" in lieu of "natural light" and the deletion of unnecessary explanatory comments. Furthermore the standards stated in §304.21 reflect the limited period of the warranty for paint, stain and wall coverings but also reflect the reality that exposure to elements at varying rates can affect the performance of these materials. Therefore, although the commission received stakeholder comments on paint, varnish and wall coverings as proposed in §§304.21(a), 304.21(b) and 304.21(c), none of the comments raised issues or resulted in a change to the proposed text other than the issues and revisions previously discussed.

Section 304.22 states the performance standards for plumbing that are within the one-year workmanship and materials warranty period. HADD listed a number of issues that it felt needed to be covered in this section; however, all of those items listed are either construction issues covered by adherence to IRC and other plumbing standards or are covered elsewhere in this chapter. Subsection (a)(1) states that plumbing fixtures shall not have chips, cracks, dents or scratches due to construction activities. Although Tilson recommended adding a proviso that such blemishes were acceptable if not visible from three feet away in normal lighting conditions, the commission disagrees. Assuming that new appliances and fixtures are installed in accordance with §304.2(a)(5)(A), a homebuyer's reasonable expectation is that the product will not be marred as a result of the builder's actions.

Several of the performance standards in §304.22(a) include exclusionary provisions for tarnished or damaged plumbing fixture finishes that have been marred by factors beyond the builder's control, such as the use of corrosive cleaning methods or the chemical content of the water supply. Eberwine suggested that the commission require the builder to test the compatibility of products installed with the water that comes into the home. The commission finds that such a requirement is not reasonable and would place an undue burden on the builder.

Plumbing fixtures with stoppers shall operate properly and retain water, per §304.22(a)(6). VBA, GSABA and Parker commented that pop-up stoppers are not designed to retain water indefinitely and that seepage occurs; therefore, these stakeholders suggested inclusion of the caveat that such stoppers shall operate as to meet manufacturer's specifications. The commission agrees that the suggested language adds clarity to the standard.

Subsection 304.22(a)(9) states that tubs and shower pans shall not crack. Eberwine offered that a shower "pan" is different from a shower "base." He offered new language but only that the remedy of repair, which is proposed to be replacement of the failed part, be replacement of the tub or shower. The commission finds that the change would not be consistent with the stated remedy of repair in other sections and declines to make the revision offered.

Section 304.22(b) sets forth one-year performance standards for plumbing pipes and vents. Although Eberwine submitted suggested language revisions, his offerings did not improve the sections addressed.

Sections 304.23 and 304.24 provide the one-year performance standards for heating, cooling and ventilation parts and electrical systems and fixtures that are not a part of the delivery systems covered under subchapter C. Throughout these two sections the commission only received comments on issues already

discussed, such as the definition of the term "excessive," use of the terms "construction activities" and "normal light" and the deletion of unnecessary explanatory comments. The commission has revised the language in accordance with its findings on those comments as previously explained. The commission also received comments similar to others discussed before suggesting the addition of language that reiterates performance in accordance with manufacturer's specifications, which the commission has declined to include for the reasons discussed earlier.

Section 304.25 sets out the performance standards expected for interior trim work. Comments and revisions not already addressed include the suggestions by VBA, Parker and BCSHBA that subsection (b) regarding performance standards for shelving should be revised. The proposed text states that the length of a closet rod shall not be shorter than the actual length between the end supports in an amount equal to or exceeding 1/4 of an inch. Those who provided comments suggested that the standards should provide that the closet rod should extend at least two-thirds into the support bracket at each end. The commenters felt that this would offer assured support for a load bearing rod. However, the commission has determined that the suggested language does not provide the same objectivity for compliance with the standard; therefore, it has not revised this section as a result of these comments.

The commission deleted proposed §304.25(a)(5) related to interior trim in a closet to address consumer concerns regarding aesthetics. Section 304.25(a)(4) now addresses all trim, regardless of its placement in a closet.

Section 304.26 states standards for mirrors, interior glass, and shower doors. TAB and Little commented that a shower door is not water tight; and therefore, the performance standard in §304.26(c), that a shower door shall not leak, could not be achieved if the homeowner sprayed water directly at the door. The commission finds that under normal use, the performance standard is achievable.

Section 304.27 regarding performance standards for hardware and iron work has been revised to delete maintenance suggestions that the commission will address in separate guidelines for homeowners. In addition, the commission received comments from Parker and VBA that the performance standard that interior ironwork will not rust should be modified to add "unless the finish is installed as a design feature." The commission feels that this issue is already covered by the exclusion in subchapter A for specialty features. Therefore, the commission has not adopted the suggested language.

Section 304.28 sets out performance standards for countertops and backsplashes. For countertops generally, the performance standard for levelness is that a countertop must be level to within 1/4 of an inch in a six-foot run. Tilson asserted that the standard was too difficult to achieve because of the cumulative variations for levelness in foundations, cabinetry and countertops. However, the commission has determined that the standard is reasonable and achievable without undue added expense for construction.

Tilson made the same comment for the performance standard requiring that countertops not bow or warp in an amount equal to or exceeding 1/16 of an inch per linear foot. For that standard, Tilson suggested that the better measurement is 1/8 of an inch per linear foot. Again, the commission has determined that the proposed standard is both reasonable and achievable without unreasonably increasing the cost of construction.

The performance standards for fireplaces are included in §304.29. GSABA suggested that in the subsection that requires that a fireplace draw properly, the commission should add "when operated in accordance with manufacturer's specifications." For manufactured products, warranty provisions generally require that those products be operated in accordance with specification in order to receive the benefit of the warranty. Therefore, the commission has determined that the suggested language is not necessary to clarify the standard. In addition to the deletion of explanatory language within the standards for fireplaces, the commission has revised this section as a result of a comment received from Eberwine.

Eberwine noted that the standard allowance for a chimney to separate from the main structure in an amount less than one-half inch in a ten foot vertical measurement may create a situation in which a chimney is separated from the main structure up to one and a half inches in a thirty foot home. Eberwine expressed concern that this would create an issue of structural integrity. The commission has determined that since this standard is about external chimneys, and the gaps between adjacent materials are addressed elsewhere in the standards, this section is unnecessary. Accordingly, the commission has deleted it.

Section 304.30 provides performance standards for irrigation systems. GSABA suggested that these standards should not be adopted. The commission has determined that if an irrigation system is installed, the proposed standards are reasonable performance standards that do not add significantly, if at all, to the cost of construction. The commission did revise the standard to make clear that it is not requiring that irrigation systems be installed, but that the standards apply if an irrigation system is installed by the builder. GSABA also suggested that subsection (b), which addresses water spray from a properly installed irrigation system, should be revised to state that water coverage must be "substantially" complete and that water must not spray "excessively" on unintended areas. GSABA stated that there is no way to keep water spray from unintended areas. The commission disagrees. Sprinkler heads must be positioned such that areas that will be damaged by water are not sprayed when the system is in operation.

Section 304.31 states performance standards for fencing. Subsection (a) as proposed provides that fences shall not lean in excess of 7.5% out of vertical. However, Lennar and Stark both suggested different measurements out of concern that the proposed standard allows excessive leaning. The commission revised the standard to provide that a fence shall not lean more than two inches out of plumb due to construction activities.

Performance standards for yard grading are covered in §304.32. Although the proposed standard references the IRC, both Stark and Lennar commented that the IRC is not particularly instructive on the topic. Lennar suggested that reference to the HUD standards might be preferable because those standards offer more direction. Proper drainage is an important feature that affects foundation stability. Therefore, the commission has determined that it is better to direct builders to use grading and drainage standards either as promulgated in the IRC or other governmental regulations. In paragraph (a)(2) of this section, Eberwine suggested that it is better to require the homeowner to "maintain" the drainage pattern as opposed to "preserving" it. The commission accepted the suggestion.

In §304.33, the commission has provided performance standards for pest control. The standard provides that eave returns, truss blocks and other attic and roof vent openings shall not

permit rodents, vermin, birds and other similar pests into the home or attic space. GSABA stated that including eave returns would conflict with the IRC, but the commission could not find that conflict. Little and TAB pointed out that there is no opening small enough to keep ants, roaches and other "vermin" out. Therefore, the commission removed the term "vermin." Eberwine offered a grammatical correction, which the commission has incorporated.

Subchapter C provides the performance standards for plumbing, electrical, heating and air-conditioning delivery systems subject to a minimum warranty period of two years.

Parish submitted written comments regarding §304.50(a). He suggested that the section should state that a builder is not responsible for the energy provider's (power company's) inadequate lines or transformer voltage spikes or surges that could cause lights to dim or light bulbs to blow out. The commission agrees with the substance of the comment but feels that the issue is adequately covered.

Tilson commented on §304.50(d)(3) and suggested that this paragraph be removed completely. The commission agrees that the proper placement of this paragraph is within subchapter B and has moved it accordingly.

Section 304.51 sets forth the standards for plumbing delivery systems. Tilson suggested that §304.51(a)(1)(A) should be deleted because the builder should be responsible for installation in accordance with the Code and if a water pipe freezes, it should not be the builder's responsibility. TAB commented that this paragraph should be revised to include "that was not installed in accordance with the applicable code" after "If a water pipe…". The commission agrees that temperature and outside/inside weather is largely outside of the builder's control. However, the builder is responsible for installing and insulating water pipes in accordance with the Code, so the additional language is not necessary. If a pipe is not installed and insulated in accordance with the Code, it is considered a construction defect.

Subsection 304.51(a)(4) provides that water pressure shall not exceed 80 pounds per square inch in any part of the water supply system located inside the home. The IRC provides that minimum static pressure at the building entrance for either a public or private water supply system is 40 pounds per square inch, which is repeated in the standard. The proposed performance standard also provides that if the water supply system does not deliver water to the building at the required minimum static pressure, the builder is not responsible for water pressure variations originating from the water supply source. However, Poage asserted that §304.51(a)(4)(A) should require a builder to provide a regulator to regulate overpressure from the water supply source. The commission does not agree. The installation of a water pressure regulator after the entrance of the water into the house is not a necessity in most instances. Therefore, addition of a regulator may only become a necessity if the water pressure exceeds 80 pounds per square inch as per the standard. The proposed standard also stated that if water pressure within the home is excessively high or low, the builder is required to take action to bring the variance within the standard. Tilson commented that this paragraph should be completely rephrased to clarify that the builder is not responsible for low water pressure entering a home from the water supply. The commission agrees that the builder is not responsible for water pressure that does not meet the minimum static pressure when entering the home from the supply source. Accordingly, this paragraph has been modified to remove the term "low".

Section 304.52 covers the performance standards for heating, air-conditioning and ventilation systems. Although Poage commented that a reference to the Code and manufacturer's specifications should be included in §304.52, the requirement that construction meet Code specifications and that manufacturer's specifications be met for installation of manufactured consumer products are covered in subchapter A. HADD commented that §304.52(b)(1) should be revised to replace 68 degrees with 72 degrees because 68 degrees is too low. The commission disagrees because the temperature stated in the standard is consistent with the ASHRAE guidelines. HADD also commented that the 4-degree temperature range proposed in §304.52(b)(1)(C) is too wide a variance. The commission agrees that without modification the standard is not clear. Accordingly, the commission has modified the subsection, which is now found at §304.52(b)(1)(B) to provide that the temperatures may vary up to 4-degrees Fahrenheit between rooms, so long as the temperatures meet the standard stated in §304.52(b)(1).

Subsection 304.52(b)(2) provides that an air-conditioning system shall produce an inside temperature of at most 78-degrees Fahrenheit under the local outdoor summer design conditions as specified in the Code. HADD complains that 78 degrees Fahrenheit is too high. However, the proposed standard meets the ASHRAE standards; therefore, the commission has not modified the subsection as a result of the comment. Foster commented that the tolerance of a 4-degree variance between rooms is too broad in §304.52(b)(2)(C). The commission declines modification because the 4-degree variance is consistent with the ASHRAE guidelines. However, like the standard above in subsection 304.52(b)(1)(B), the commission has added the caveat that the temperature shall not vary between rooms greater than the standard set forth in §304.52(b)(2). The commission also added this caveat to §304.52(b)(3). Larkins suggested that the commission use the Air Conditioning Contractors Association guidelines for performance standards on cooling issues and measurements. The commission has determined that the ASHRAE standards are more appropriate for statewide performance standards. Larkins also commented that the 4-degree variance between rooms is vague. However, the commission finds that the modification it has made as a result of comments discussed above addresses this issue. Henderson commented that §304.52(d)(3) should be revised to delete the phrase "the percentage permitted by ANSI/ASHRAE Standard." Henderson notes that the IRC provides a sufficient objective standard regarding sealing of ductwork and the loss factors for forced-air distribution systems. The commission agrees that the deletion will provide further clarity to the section and has deleted the reference to the ANSI/ASRAE standards and has added the objective standard that ductwork shall not leak in excess of the standards set by Code.

Subchapter D states the performance standards for foundations and other structural components of a home. Harwell commented that "Foundations and" should be deleted from the title of the subsection due to redundancy. The commission agrees and the title has been modified accordingly.

Poage commented that the builder should be required to provide the homeowner with a grid showing the foundation and/or floor elevations of the residence taken when the residence is substantially complete. The commission has fully addressed this issue

by the definition of "original construction" in subchapter A and that definition has been incorporated into this subchapter.

Grissom commented that subchapter D should be modified so that the State of Texas does not specify prescriptive performance standards but instead defers to a competent group of professional engineers active in the profession to provide such details. The commission has determined that construction defects in slab foundations should be evaluated using the guidelines promulgated by the Texas Section of the American Society of Civil Engineers (2002) (ASCE Guidelines) to permit an evaluation based on an objective standard, which is in keeping with the legislative intent of the Act. Grissom asserts that limiting tilt to ".05 degrees" in any direction is too restrictive and a deflection ratio of L/360 is too loose. However, the commission finds that the measurements it has put forth are consistent with the prevailing engineering consensus on performance standards for slab foundations. Houston made a similar comment but he also referred to design standards used by engineers. The commission's intent is to develop objective performance standards used for evaluation of foundation performance post-construction, not to address design standards that should be followed pre-construction. Accordingly, the commission has not made changes as a result of Grissom's or Houston's comments.

TAB expressed concern that the remedy as stated in each subsection of §304.100 in which the commission has stated that if a lack of compliance with a stated standard exists, the builder shall take such action as is necessary to bring the variance into compliance with the standard-or similar words-is too vague as to what is expected on the part of the builder. For the sake of clarity, TAB has suggested that the language be modified to require the builder to pursue the appropriate remedial measure as described in Section 7 of the ASCE Guidelines. Bonded Builders provided the same comment. The commission agrees that the suggested revision will provide better guidance and has adopted TAB's suggestion and a similar suggestion made by Pierry.

Subsection (a) of §304.100 states that slab foundations should be evaluated using the guidelines promulgated by the Texas Section of the American Society of Civil Engineers (2002) (ASCE Guidelines). Harwell commented that this paragraph should be rephrased so that the format would be more consistent with the structural standards. Bonded Builders and Pierry offered similar comments. The commission agrees and has modified the paragraph as suggested by Harwell.

HADD commented that there was no need for the commission to add extra definitions or other criteria to the ASCE Guidelines. The commission used the ASCE Guidelines to create an objective standard for evaluating slab foundation performance. The commission's additional criteria provide information for the third-party inspector who must evaluate a claim of a defective foundation.

Harwell offered that the stated standard for deflection should reference the definition of deflection in the ASCE Guidelines. GSABA also offered a definition for "deflection." However, the commission finds that "deflection" is a term of art that needs no further definition and the suggested additional language does not add clarity to the proposed text.

TAB commented that §304.100(a)(1)(A) should be revised to tie together the symptoms of distress found in Section 5 of the ASCE Guidelines with the building and performance standards set forth by the commission in subchapters B and C. TAB believes that the change is necessary because, in the absence of this link between the two standards, there may be a finding of a violation of this standard without real evidence of a structural problem in a home. The commission disagrees with TAB's suggested reference to the performance standards in subchapters B and C because this paragraph is to be used in evaluating performance of foundations, which is not determined by workmanship and materials performance.

Eberwine also commented on §304.100(a)(1)(A), suggesting that the reference to L/360 should be supplemented with "or the equivalent of this degree of deflection." He based his suggestion on concern that the proposed language fails to consider a home that is constructed with materials or components that are damaged or otherwise compromised by slab deflection that does not exceed the limits of deflection. Pierry suggested language that also addressed the situation Eberwine describes. The commission has modified the paragraph to comport with Pierry's suggested language.

In §304.100(a)(1)(A) the commission had proposed that a construction defect would exist if deflection exceeded L/360 and there existed a combination of two or more associated symptoms of distress. The commission has revised the standard such that deflection exceeding L/360 accompanied by more than one symptom of distress would be evidence of a construction defect. This change addresses HADD's comment on the number of symptoms of distress. Little also commented that the paragraph should be revised for better clarity; however, Little's suggested language was not accepted because the commission has modified the paragraph as addressed above.

Harwell recommended changes to §304.100(a)(1)(B) to add clarity that are the same changes he suggested for revising the definition of "original construction" such that evaluations will be based on elevations taken at an approximate rate of at least one elevation per 100 square feet, subject to obstructions. The commission adopted the modifications in the definition of "original construction" and has incorporated them again in this section. Stark pointed out that word "and" should be deleted from the end of the sentence in this subpart of paragraph (1) because that terminology would require that all three conditions identified in paragraph (1) exist. Based on other modifications to this section and the commission's determination that §304.100(a)(1)(B) as proposed did not state a performance standard, the commission has deleted the proposed section.

Section 304.100(a)(1)(C) as proposed provided that a slab foundation shall not exhibit tilt greater than a one-half of one percent change from the original construction elevations that result in actual observable physical damage to the components of the home identifiable in subchapters B and C. Harwell suggested that the language be changed such that "the slab shall not move after construction in a tilting mode in excess of one percent from the original elevations resulting in actual observable physical damage to the components of the home identifiable in subchapter B and subchapter C of this chapter." GSABA, Bonded Builders, TAB and Little made similar comments. Stark commented that in a pure tilt situation, actual physical damage to a home may not be observed even if a slab tilted beyond reasonable expectations that affect usage of the home. Eberwine offered a comment similar to Stark's. Houston expressed concern that one-half of one percent tilt is too liberal a standard under current achievable performance standards with regard to fill settlement. The commission has determined that Harwell's suggested language regarding the one percent tilt from the original construction elevations

best expresses the appropriate standard regarding movement. Other recommended changes, that there be no requirement of actual physical damage to the home as a result of tilt and that the physical damage must rise to the level of violating the performance standards in subchapters B and C, are rejected. One percent tilt from the original construction elevations, considering the revisions to the definition of that term, is sufficient to protect a homeowner from a house that is tilted to the degree that it would affect functionality of the home. In addition, subchapter D provided performance standards for the foundation and performance of the structural components is not dependent upon a defect in workmanship and materials. Also, the commission has deleted the references to subchapters B and C in this paragraph for the reasons stated previously.

The subsection on slab foundations also provides that if measurements and associated symptoms of distress show that a slab foundation does not meet the deflection and tilt standards stated, the builder is required to bring the slab into compliance. As discussed previously, the language regarding the remedy has been revised for clarity. Still others commented that use of the connector "and" would require a slab to exhibit both deflection and tilt in order to be defective. The commission has changed the "and" to an "or" to reflect its intent. Eberwine commented that "and associated symptoms of distress" should be deleted because the builder can simply repair the "symptoms" and comply with the standard. The commission believes that the modifications resulting from TAB's suggested changes to the remedy will address this issue. Harwell suggested that the commission should reference remedial measures contained in the parties' warranty agreement, if any. However, if parties have an agreement with terms that provide greater protection than the commission's adopted provisions for limited warranty and performance standards, the Act provides that the agreement will supersede the adopted provisions. HADD commented that there is no requirement to record the original tilt or original deflection, which the commission discussed earlier in subchapter A regarding the definition of "original construction elevations". Although there is no requirement that original construction elevations be recorded, if the builder does not have original construction elevations available then a home is presumed level + or - 0.75 of an inch over the length of the foundation thereby creating a reasonable base line for evaluation. Therefore, no additional revision is warranted as a result of HADD's comment.

Subsection (b) lays out the performance standards for floor over pier and beam foundations. Houston again commented that floor deflection tolerance of L/360 is unacceptable. The commission declines revision for reasons expressed above. Harwell offered similar revisions to this performance standard as he offered for slab foundations. The commission has modified the section to incorporate those modifications it adopted previously for purposes of consistency. GSABA's suggestion that the phrase "provided the conditions are not the result of homeowner's actions as described in subchapters A, B or C" be added is rejected because the issue has been taken care of by the adoption of language suggested by TAB and Pierry regarding remedial measures. Eberwine commented that "the equivalent of" be added before L/360. Again, revisions already adopted by the commission address the situation raised by Eberwine's suggestion.

Regarding floor over pier and beam foundations, Pierry commented regarding §304.100(b)(1)(B) that the word "move" should be replaced with "deflect" and the paragraph be rephrased for clarity. The commission agrees and has modified the paragraph in accordance with the suggestion.

Pierry also commented on §304.100(b)(2)(B) regarding load bearing components of a home. He made a suggested change to the remedy language that the phrase "repair, reinforce or replace such load bearing component to restore the structural integrity of the home or the performance of the affected structural system" should be added. The commission agrees and has modified the section accordingly. The commission has also revised the language regarding the appropriate remedy of repair in other paragraphs as suggested by Pierry.

HADD commented that the phrase "home resulting in actual observable physical damage to the home identifiable in Subchapter B and Subchapter C of this chapter" should be deleted. The commission has agreed here and elsewhere in subchapter D and has made the suggested deletion.

Eberwine commented that in §§304.100(b)(3)(A) and 304.100(b)(3)(B) a builder can simply repair only the "actual observable physical damage." The commission has addressed this comment as discussed above. Eberwine also commented that §304.100(b)(3)(A) does not address circumstances of deflection while a home is under construction. The commission's jurisdiction arises after the warranty has become effective, which is generally post-construction. If a home has actual observable physical damage prior to purchase, the buyer may or may not make the decision to accept the home as built.

Comments were received about §304.100(b)(4), damage to structural components. Eberwine suggested adding the phrase "or if the structural component is modified or otherwise damaged in excess of, or in violation of, the manufacturer's specifications to paragraph (B)". The commission has not made a modification as a result of this comment because the performance standards provide for installation in accordance with manufacturer's specifications. Harwell suggested that the performance standard require a damaged structural component to "materially" compromise the structural integrity or performance of the system. The commission has not adopted this language because use of the term "materially" interjects a level of subjectivity that the commission wishes to avoid.

Pierry commented that §304.100(b)(4)(B) should be revised to include the phrase "repair, reinforce or replace such load bearing component to restore the structural integrity of the home or the performance of the affected structural system". For reasons addressed above, the commission has revised the remedy language in this section and others.

As proposed §304.100(c)(5)(A) provides that structural component must not separate from a supporting member in excess of 3/4 of an inch or such that it compromises the structural integrity or performance of the system. Houston commented that a structural component should not separate from a supporting member in excess of 3/4 of an inch regardless of whether it compromises the structural integrity of the system. Pierry commented that this paragraph should be revised to replace "in excess of" with "more than". The commission agrees with the suggested change and made it in both subparts A and B.

TAB commented on §304.100(b)(5)(B) and suggested that the second "is" be deleted for readability. The commission agrees and has revised accordingly. Pierry offered the same language changes regarding remedies as before that the commission has addressed and incorporated into revisions.

Regarding §§304.100(b)(6)(A) and 304.100(b)(6)(B) Harwell asserted again that the performance standard should require a "material" compromise of the structural integrity of a system. The

commission declines to make this change for the reason given above.

HADD suggested that the subchapter D does not address certain conditions it described as hot foundations, inadequate drainage, damage caused by foundation failure, wet foundations, foundation chipping, a foundation not built according to specifications, post tension foundation failures and organic material under foundation. The commission has determined that all of the defects HADD has mentioned are covered in chapter 304. HADD uses the term "consequential damages," which are not within the purview of the Act. Therefore, the commission did not include the issue in this chapter. However, in subchapter A the commission has addressed the builder's responsibility to repair any damage to components of the home caused by a construction defect.

Some general comments were received that did not reference a particular section. BCSHBA and VBA commented that the performance standards are stringent and may impact the costs of home building. The commission considered issues of increased construction costs when developing the proposed standards. Costs of home building may increase somewhat for those builders that do not currently build to the performance standards adopted. However, the commission has determined that the performance standards promulgated balance the potential for increased costs with the need for the building of affordable homes in Texas. Other general comments received were considered in adopting this chapter if the subject matter of the comment was within the jurisdiction of the commission and the purview of this chapter on limited warranties and building and performance standards.

Vint commented that "mold prevention" products are available to eliminate mold growth within energy efficient walls and other water sensitive areas of a home. Vint recommended use of a particular product; however, the commission does not endorse particular commercial products for use in home construction or maintenance. The commission has left flexibility in the statements regarding the builder's responsibilities to repair to provide opportunities for builders and inspectors to use their professional judgment in determining an acceptable method of repair when a construction defect is observed.

No-Burn commented that there are non-toxic fire retardants that have no harmful side effects to humans or pets and no adverse effect on wood. Again, the commission does not endorse any particular commercial products or upgraded material for use in home construction.

SUBCHAPTER A. GENERAL PROVISIONS

10 TAC §§304.1 - 304.3

Cross Reference to Statutes: Title 16, Property Code ch. 426 and §§408.001 and 430.001

No other statutes, articles, or codes are affected by the adoption.

§304.1. General Provisions.

(a) Scope. This chapter describes the minimum standards of performance for the various elements or components of a home as described. Third-party inspectors appointed pursuant to §313.11 of this title will make recommendations for repair or replacement of those elements or components of a home that do not meet these standards during the applicable warranty period based upon the expected level of performance described in these standards for residential construction to which the standards apply. If an element or component of a home is not described particularly in this chapter, the element or component shall be constructed in accordance with any written agreement or, if there is no agreement, in accordance with usual and customary residential construction practices and the element or component shall perform for the purpose for which it is intended for the period of the applicable warranty. All home construction shall comply with applicable Codes.

(b) Effective Date. The provisions of this chapter shall apply to all applicable residential construction projects that must be registered with the commission pursuant to chapter 303, subchapter B, of this title if the construction commences on or after June 1, 2005. Construction commences on the earlier of the date that the parties enter into an agreement for a transaction governed by the Act or the date that work commences.

(c) Definitions. The following words and terms when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise.

(1) Adverse effect--A tangible condition that substantially impairs the functionality of the habitable areas of the home.

(2) Builder Responsibility--A statement of the corrective action required by the builder to repair the construction defect and any other damage resulting from making the required repair. Parties may agree to an alternative remedy.

(3) Code--The International Residential Code or, if the context requires, the National Electrical Code.

(4) Electrical Standard--a standard contained in the version of the National Electrical Code (NEC), as follows:

(A) for residential construction located in a municipality or the extraterritorial jurisdiction of a municipality, the version of the NEC applicable to electrical aspects of residential construction in the municipality under Local Government Code §214.214 and which is effective on the date of commencement of construction of the home;

(B) for residential construction located in an unincorporated area not in the extraterritorial jurisdiction of a municipality, the version of the NEC applicable to electrical aspects of residential construction in the municipality that is the county seat of the county in which the construction is located and which is effective on the date of commencement of construction of the home; and

(C) for residential construction located in an unincorporated area in a county that does not contain an incorporated area, the version of the NEC that existed on May 1, 2001.

(5) Excessive or excessively--a quantity, amount or degree that exceeds that which is normal, usual or reasonable under the circumstance.

(6) Exclusion- items, conditions or situations not warranted or not covered by a performance standard.

(7) Extreme Weather Condition(s)--weather conditions in excess of or outside of the scope of the design criteria stated or assumed for the circumstance or locale in the Code.

(8) The International Residential Code (IRC)--substantial compliance with the non-electrical standards contained in the version of the *IRC for One- and Two-Family Dwellings*published by the International Code Council (ICC) as follows:

(A) for residential construction located in a municipality or the extraterritorial jurisdiction of a municipality, the version of the IRC applicable to non-electrical aspects of residential construction in the municipality under Local Government Code §214.212 and which is effective on the date of commencement of construction of the home;

(B) for residential construction located in an unincorporated area not in the extraterritorial jurisdiction of a municipality, the version of the IRC applicable to non-electrical aspects of residential construction in the municipality that is the county seat of the county in which the construction is located and which is effective on the date of commencement of construction of the home; and

(C) for residential construction located in an unincorporated area in a county that does not contain an incorporated area, the version of the IRC that existed on May 1, 2001.

(9) Habitable Area--a living space as defined in §301.1(14) of this title.

(10) Homeowner Responsibility--an action required by the homeowner for proper maintenance or care of the home or the element or component of the home concerned. A homeowner's failure to substantially comply with a stated homeowner responsibility creates an exclusion to the warranty for the performance standard.

(11) Major Structural Components--the load-bearing portions of the following elements of a home:

(A) Footings and Foundations;

(B) Beams;

(C) Headers;

(D) Girders;

(E) Lintels;

(F) Columns (other than a column that is designed to be cosmetic);

(G) Load-Bearing portions of walls and partitions;

(H) Roof framing systems, to include ceiling framing;

(I) Floor systems; and

(J) Masonry Arches.

(12) Manufactured Product--a component of the home that was manufactured away from the site of the home and that was installed in the home without significant modifications to the product as manufactured. Manufactured products commonly installed in residential construction include but are not limited to dishwashers, cook tops, ovens, refrigerators, trash compactors, microwave ovens, kitchen vent fans, central air conditioning coils and compressors, furnace heat exchangers, water heaters, carpet, windows, doors, light fixtures, fireplace inserts, pipes and electrical wires. For purposes of this chapter, a manufactured product includes any component of a home for which the manufacturer provides a warranty, provided that the manufacturer permits transfer of the warranty to the homeowner.

(13) Original Construction Elevations--actual elevations of the foundation taken prior to substantial completion of the residential construction project. Such actual elevations shall include elevations of porches and garages if those structures are part of a monolithic foundation. To establish original construction elevations, elevations shall be taken at a rate of approximately one elevation per 100 square feet showing a reference point, subject to obstructions. Each elevation shall describe the floor. If no such actual elevations are taken then the foundation for the habitable areas of the home are presumed to be level +/- 0.75 inch (three-quarters of an inch) over the length of the foundation.

(14) Performance Standard(s)--the standard(s) to which a home or an element or component of a home constructed as a part of new home construction or a material improvement or interior renovation must perform.

(15) Span--the distance between two supports.

(16) Substantial Completion--the later of:

(A) the stage of construction when a new home, addition, improvement, or alteration to an existing home is sufficiently complete that the home, addition, improvement or alteration can be occupied or used for its intended purpose; or

(B) if required, the issuance of a final certificate of inspection or occupancy by the applicable governmental authority.

(d) Resolving conflicts among standards. When an inconsistency exists between the Code, manufacturer's instructions and specifications, the standard required by the United States Department of Housing and Urban Development for Federal Housing Administration or Veterans Administration programs, ANSI/ASHRAE Standard (62.2-2003) or the commission-adopted performance standards, the most restrictive requirement shall apply.

§304.2. General Provisions Applicable to all Residential Construction for New Homes, Material Improvements and Interior Renovations.

(a) Builder Responsibilities for Compliance with Performance Standards and Repair Obligations.

(1) Builder's Work. The builder is responsible for all work performed under the direction of the builder for the period of the applicable warranty. The builder is only responsible for construction defects about which the builder receives notice on or before the second anniversary of the date of discovery of the alleged construction defect but in no event later than thirty days following the applicable warranty period stated in §304.3(a) of this subchapter, unless otherwise expressly stated herein.

(2) Repair of a construction defect. Any repair shall be performed in a manner and using such materials and methods as recommended by the third-party inspector in accordance with the inspector's duties under §313.14 of this title and consistent with the Code, the performance standard or in accordance with §304.2(a). In the event a third-party inspector determines that a construction defect is present but the inspector does not make a recommendation as to the procedure or method of repair, then the repair shall be in accordance with usual and customary building practices or as agreed by the parties. If the third-party inspector's report is appealed, then any repairs shall be performed in a manner and using such materials and methods as recommended by the appellate panel. If the appellate panel does not make a recommendation as to the procedure or method of repair, then the repair shall be made in accordance with the usual and customary business practices or as agreed by the parties.

(3) Repair Condition. In connection with a repair of a construction defect, any repairs performed by the builder will include those components of the home that have to be removed or altered in order to repair the construction defect. Repair shall be made so that the condition is returned to its condition as it existed at the time immediately preceding the construction defect.

(4) Finish. Surfaces altered incident to any repair will be finished or touched up to match the surrounding area as closely as practical. In connection with the repair of finish or surface material, such as paint, wallpaper, flooring or a hard surface, the builder will match the standard and grade as closely as reasonably possible. Builder will attempt to match the finish, but will not be responsible for discontinued patterns or materials, color variations or shade variations. When the surface finish material must be replaced and the original material has been discontinued, the builder is responsible for installing replacement material substantially similar in appearance to the original material.

(5) Manufactured Products. The builder shall install all manufactured products in accordance with the manufacturer's instructions and specifications.

(A) The builder shall use only new manufactured products and parts unless otherwise agreed in writing by the parties. If the builder did not install a manufactured product in accordance with the manufacturer's specifications or use newly manufactured parts as required, the builder shall take such action as is necessary to bring the variance within the standard.

(B) The homeowner shall notify the builder of a known construction defect not later than the second anniversary of the date of discovery of the construction defect or not later than thirty days following the applicable warranty period provided in §304.3(a) of this subchapter.

(6) Specialty Feature. Notwithstanding a performance standard stated in this chapter, a specialty feature, which is work performed or material supplied incident to certain design elements shown on the construction plans and specifications and agreed to in writing by the builder and the homeowner, shall be deemed to be compliant with the performance standards stated in this chapter so long as all items are compliant with the Code.

(b) Exceptions and Exclusions from Builder's Responsibilities.

(1) The builder is not responsible for repair, loss or damage to a component or that part of a component of a home caused by or made worse by any of the following:

(A) Work performed or material supplied incident to construction, modification or repair to the home performed by anyone other than the builder or persons providing work or material at the direction of the builder.

(B) The negligence, improper maintenance, misuse, abuse, failure to follow manufacturer's recommendations, failure to take reasonable action to mitigate damage, failure to take reasonable action to maintain the residence or other action or inaction of anyone other than the builder or persons providing work or material at the direction of the builder.

(C) Failure of the homeowner to comply with the homeowner's responsibilities as set forth in subsection (c) of this section or as may be stated separately elsewhere in this chapter.

(D) Alterations to the grade of the soil that are not in compliance with the Code or applicable governmental regulations.

(E) Normal wear and tear or normal deterioration to any component of the home.

(F) Extreme weather conditions.

(G) Riot, civil commotion, war, terrorism, vandalism, aircraft, vehicle or boat.

(H) Fire, smoke or water damage unless such loss or damage is a direct result of a construction defect.

(I) Change in the underground water table that exerts pressure on, seeps, or leaks under the home, sidewalk, driveway, foundation or other structure or causes subsidence or sinkholes.

(J) Erosion or accretion of soils unless such loss or damage is a direct result of a construction defect.

(K) Insects, birds, rodents, vermin or other wild or domestic animals unless such loss or damage is a direct result of a construction defect.

(L) The quality and potability of water unless caused by a construction defect.

(M) While the home is being used primarily for nonresidential purposes.

(N) Use for which the home or the component of the home was not designed.

(O) Use that exceeds the normal design loads prescribed by the Code or the engineer of record.

(P) Homeowner delay in reporting a known construction defect or failing to take reasonable action necessary to prevent further damage to the home.

(Q) For remodeling projects, improvements, alterations or additions to an existing residence where the performance standard cannot be achieved due to an existing condition.

(R) Abuse or misuse of a home component or manufactured product by anyone other than the builder or persons providing work or material at the direction of the builder.

(2) No Actual Physical Damage. The builder shall not be responsible for any condition that does not result in actual physical damage to the home, including, but not limited to the presence of radon gas, formaldehyde or other pollutants or contaminants, or the presence or effect of mold, mildew, toxic material, or volatile organic compound, unless such condition is a direct result of a construction defect.

(c) Homeowner's Responsibilities.

(1) Home Maintenance. Maintenance of the home and the lot on which the home is located are essential to the proper functioning of the home. The homeowner is responsible for maintenance of the home and the lot on which it is located. The homeowner is responsible for maintenance items described in this paragraph and those maintenance items identified separately in the performance standards set forth in this chapter. Additionally, the homeowner is responsible for ongoing maintenance responsibilities that affect the performance of the home but that may not be expressly stated in this chapter. Such ongoing maintenance responsibilities include, but are not limited to, periodic repainting and resealing of finished surfaces as necessary, caulking for the life of the home, regular maintenance of mechanical systems, regular replacement of HVAC filters, cleaning and proper preservation of grading around the home and drainage systems to allow for the proper drainage of water away from the home.

(2) Manufactured Products. The homeowner shall use and perform periodic maintenance on all manufactured products according to the manufacturer's instructions and specifications. The misuse, abuse, neglect or other failure to follow manufacturer's specifications with regard to manufactured products may void the manufacturer's warranty.

(3) Landscape Planting. The homeowner shall take measures to prevent landscaping materials or plants from contacting the exterior surface of the home and from interfering with the proper drainage of water away from the foundation. The homeowner should not improperly alter the proper drainage pattern or grade of the soil within ten feet of the foundation so that it negatively impacts the home's performance or fails to comply with the Code.

(4) Humidity or Dryness in the Home. The homeowner should take the following actions to prevent excessive moisture accumulation by:

(A) properly using ventilation equipment;

(B) preventing excessive temperature fluctuation; and

(C) taking any other action reasonably necessary to avoid excessive moisture, dampness, humidity or condensation in the home that may lead to damage due to excessive moisture or dryness.

(5) Proper Maintenance and Care of Home Components. The homeowner shall properly maintain each component of the home including proper cleaning, care and upkeep of the home. The homeowner shall use home components for the purposes for which they are intended and shall not damage, misuse or abuse home components.

(6) Self-Help. Upon observation of a circumstance that may cause further damage to the home or a component of the home, the homeowner shall take reasonable action necessary to prevent further damage to the home.

§304.3. Limited Warranties.

(a) Warranty periods. The minimum warranty periods for residential construction and residential improvements are:

(1) one year for workmanship and materials;

(2) two years for plumbing, electrical, heating, and air-conditioning delivery systems;

(3) ten years for major structural components of the home; and

(4) ten years for the warranty of habitability.

(b) Manufactured Product Warranties. The builder will assign to the homeowner, without recourse, the manufacturer's warranty for all manufactured products that are covered by a manufacturer's warranty. Any rights that inure to the homeowner provided under a manufacturer's warranty are the obligation of the manufacturer. The builder does not assume any of the obligations of the manufacturer resulting from a manufacturer's warranty, but shall coordinate with the manufacturer, suppliers or agents to achieve compliance with the performance standard. If the manufacturer does not comply with the manufacturer's warranty within a reasonable period of time, the builder will make the affected condition comply with the performance standard and seek redress from the manufacturer.

(c) Workmanship and Materials Warranty and Performance Standards. Workmanship and materials in residential construction or residential improvements are warranted to perform to the performance standards that are set forth this chapter for the minimum period established in subsection (a) paragraph (1) of this section, unless a greater period of warranty is agreed to by the parties.

(d) Delivery Systems Warranty and Performance Standards. Plumbing, electrical, heating and air-conditioning delivery systems in residential construction and residential improvements shall be warranted to perform to the performance standards that are set forth in this chapter for the minimum period established in subsection (a) paragraph (2) of this section, unless a greater period of warranty is agreed to by the parties.

(e) Structural Components Warranty and Performance Standards. Major structural components in residential construction and residential improvements shall be warranted to perform to the performance standards set forth in this chapter for the minimum period established in subsection (a) paragraph (3) of this section, unless a greater period of warranty is agreed to by the parties.

(f) Warranty of Habitability.

(1) All residential construction shall include a warranty of habitability for the minimum period established in subsection (a) paragraph (4) of this section, unless a greater period of warranty is agreed to by the parties.

(2) The warranty of habitability is a builder's obligation to construct a home or a home improvement that:

(A) is in compliance with the performance standards; and

(B) is safe, sanitary and fit for humans to inhabit.

(3) An alleged construction defect under the warranty of habitability must have a direct adverse affect on the habitable areas of the home. The warranty applies to an alleged construction defect that would otherwise have been covered by the limited warranties of §304.3(a)(1) and (2), but arose after the termination of those warranty periods, and the alleged construction defect must not have been discoverable by a reasonable prudent inspection or examination of the home or home improvement within the applicable warranty periods.

(4) A request to participate in the State-sponsored Inspection and Dispute Resolution Process (SIRP) for breach of the warranty of habitability must be filed with the commission within two years following the discovery of the condition but not later than thirty days after the tenth anniversary of the effective date of the warranty as determined by subsection (g) of this section.

(g) Effective Date of Warranties.

(1) Unless otherwise provided by a written agreement between the builder and the initial homeowner or by a manufacturer, a warranty period as described in this section for a new home begins on the earlier of the date of occupancy or transfer of title from the builder to the initial homeowner.

(2) Unless otherwise provided by a written agreement between the builder and the homeowner, a warranty period as described in this section for an improvement other than a new home or for a partially built home, which by agreement between the homeowner and the builder, someone other than the builder will complete, begins on the date the improvement is substantially completed or the terms of the construction contract are substantially fulfilled.

(h) Exclusive Warranties.

(1) The warranties established by the commission in this chapter supersede all implied warranties for new residential construction or residential improvements that commence on or after the effective date of this chapter.

(2) The warranties established by the commission in this chapter are the only warranties applicable to new residential construction unless a particular warranty is created by a statute that expressly refers to residential construction or residential improvements or is created by any express warranty set forth in writing by the builder.

(i) Waiver By Contract Prohibited. A contract between a builder and a homeowner may not waive or modify to lessen the warranty of habitability or the limited statutory warranties and building and performance standards adopted under this chapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Susan Durso
General Counsel
Texas Residential Construction Commission
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For further information, please call: (512) 475-0595

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SUBCHAPTER B. PERFORMANCE STANDARDS FOR COMPONENTS OF A HOME SUBJECT TO A MINIMUM WARRANTY OF ONE YEAR FOR WORKMANSHIP AND MATERIALS

10 TAC §§304.10 - 304.33

Cross Reference to Statutes: Title 16, Property Code ch. 426 and §§408.001 and 430.001

No other statutes, articles, or codes are affected by the adoption.

§304.10. Performance Standards for Foundations and Slabs.

(a) Performance Standards for Raised Floor Foundations or Crawl Spaces.

(1) A crawl space shall be graded and drained properly to prevent surface run-off from accumulating deeper than two inches in areas 36 inches or larger in diameter. Exterior drainage around perimeter crawl space wall shall not allow water to accumulate within ten feet of the foundation for more than 24 hours after a rain except in a sump that drains other areas.

(A) If the crawl space is not graded or does not drain in accordance with the performance standard stated in paragraph (1) of this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(B) The homeowner shall not modify improperly the existing grade or allow water from an irrigation system to cause water to accumulate excessively under the foundation. The homeowner shall not allow landscape plantings to interfere with proper drainage away from the foundation. The homeowner shall not use the crawl space for storage of any kind.

(2) Water shall not enter through the basement or crawl space wall or seep through the basement floor.

(A) If water enters the basement or crawl space wall or seeps through the basement floor, the builder shall take such action as is necessary to bring the variance within the standard stated in paragraph (2) of this subsection.

(B) The homeowner shall not modify improperly the existing grade or allow water from an irrigation system to cause water to accumulate excessively near the foundation. The homeowner shall not allow landscape plantings to interfere with proper drainage away from the foundation.

(b) Performance Standards for Concrete Slab Foundations, excluding Finished Concrete Floors.

(1) Concrete floor slabs in living spaces that are not otherwise designed with a slope for drainage, such as a laundry room, shall not have excessive pits, depressions or unevenness equal to or exceeding 3/8 of an inch in any 32 inches and shall not have separations or cracks that equal or exceed 1/8 of an inch in width or 1/16 of an inch in vertical displacement. If a concrete floor slab in a living space fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within that standard.

(2) Concrete slabs shall not have protruding objects, such as a nail, rebar or wire mesh. If a concrete slab has a protruding object, the builder shall take such action as is necessary to bring the variance within the standard stated in this paragraph.

(3) A separation in an expansion joint in a concrete slab shall not equal or exceed 1/4 of an inch vertically or one inch horizontally from an adjoining section. If an expansion joint in a concrete slab fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(c) Performance Standards for Exterior Concrete including Patios, Stem Walls, Driveways, Stairs or Walkways.

(1) Concrete corners or edges shall not be damaged excessively due to construction activities. If a concrete corner or edge is damaged excessively, the builder shall take such action as is necessary to bring the variance within the standard stated in this paragraph.

(2) A crack in exterior concrete shall not cause vertical displacement equal to or in excess of 1/4 of an inch or horizontal separation equal to or excess of 1/4 of an inch.

(A) If an exterior concrete slab is cracked, separated or displaced beyond the standard of performance stated in paragraph (2) of this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(B) The homeowner shall not over-water surrounding soil or allow the surrounding soil to become excessively dry. The homeowner shall not allow heavy equipment to be placed on the concrete.

(3) The finish on exterior concrete shall not be excessively smooth, so that the surface becomes slippery.

(A) If the finish on exterior concrete is excessively smooth so that the surface becomes slippery, the builder shall take such action as is necessary to bring the variance within the standard stated in paragraph (3) of this subsection.

(B) A concrete surface that has been designed to be smooth is excepted from this performance standard.

(4) Exterior concrete shall not contain a protruding object, such as a nail, rebar or wire mesh. If an exterior concrete surface has a protruding object, the builder shall take such action as is necessary to bring the variance within the standard stated in this paragraph.

(5) A separation in an expansion joint in an exterior concrete shall not equal or exceed 1/2 of an inch vertically from an adjoining section or one inch horizontally, including joint material. If an expansion joint fails to perform in accordance with the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(6) A separation in a control joint shall not equal or exceed 1/4 of an inch vertically or 1/2 of an inch horizontally from an adjoining section. If a control joint fails to perform in accordance with the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(7) Concrete stair steepness and dimensions, such as tread width, riser height, landing size and stairway width shall comply with the Code. If the steepness and dimensions of concrete stairs do not comply with the Code, the builder shall take such action as is necessary to bring the variance within the standard for Code compliance.

(8) Handrails shall remain securely attached to concrete stairs. If handrails are not firmly attached to the concrete stairs, the builder shall take such steps necessary as to attach the rails securely.

(9) Concrete stairs or stoops shall not settle or heave in an amount equal to or exceeding 3/8 of an inch. Concrete stairs or stoops shall not separate from the home in an amount equal to or exceeding one inch, including joint material. If the stairs or stoops settle or heave, or separate from the home in an amount equal to or exceeding the standard above builder shall take such action as is necessary to bring the variance within the standard stated in this paragraph.

(10) A driveway will not have a negative slope unless due to site conditions, the lot is below the road. If a driveway has a negative slope due to site conditions, it shall have swales or drains properly installed to prevent water from entering into the garage. If a driveway has a negative slope that allows water to enter the garage in normal weather conditions, the builder shall take such action as is necessary to bring the variance within the standard stated in this paragraph.

(11) Concrete floor slabs in detached garages, carports or porte-cocheres shall not have excessive pits, depressions, deterioration or unevenness. Separations or cracks in these slabs shall not equal or exceed 3/16 of an inch in width, except at expansion joints, or 1/8 of an inch in vertical displacement. If a concrete floor slab in a detached garage, carport or porte-cochere does not meet the standards stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

§304.11. Performance Standards for Framing.

(a) Building and Performance Standard for Walls.

(1) Walls shall not bow or have depressions that equal or exceed 1/4 of an inch out of line within any 32-inch horizontal measurement as measured from the center of the bow or depression or 1/2 of an inch within any eight-foot vertical measurement. If a wall does not meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(2) Walls shall be level, plumb and square to all adjoining openings or other walls within 3/8 of an inch in any 32-inch measurement. If a wall does not meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(3) A crack in a beam or a post shall not equal or exceed 1/2 of an inch in width at any point along the length of the crack. If a crack in the beam or post fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(4) A non-structural post or beam shall not have a warp or twist equal or exceeding one inch in eight-feet of length. Warping or twisting shall not damage beam pocket. If a non-structural post or beam fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(5) Exterior sheathing shall not delaminate or swell.

(A) If exterior sheathing delaminates or swells, the builder shall take such action as is necessary to bring the variance within the standard stated in paragraph (5) of this subsection.

(B) The homeowner shall not make penetrations in the exterior finish of a wall that allow moisture to come in contact with the exterior sheathing.

(6) An exterior moisture barrier shall not allow an accumulation of moisture inside the barrier.

(A) If an exterior moisture barrier allows an accumulation of moisture inside the barrier, the builder shall take such action as is necessary to bring the variance within the standard stated in paragraph (6) of this subsection.

(B) The homeowner shall not make penetrations through the exterior moisture barrier that permit the introduction of moisture inside the barrier.

(b) Performance Standards for Ceilings. A ceiling shall not bow or have depressions that equal or exceed 1/2 of an inch out of line within a 32-inch measurement as measured from the center of the bow or depression running parallel with a ceiling joist. If a ceiling has a bow or depression that is greater than the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(c) Performance Standards for Sub-floors.

(1) Under normal residential use, the floor shall not make excessive squeaking or popping sounds. If the floor makes excessive squeaking and popping sounds under normal residential use, the builder shall take such action as is necessary to bring the variance within the standard stated in this paragraph.

(2) Sub-floors shall not delaminate or swell to the extent that it causes observable physical damage to the floor covering or visually affects the appearance of the floor covering. Exposed structural flooring, where the structural flooring is used as the finished flooring, is excluded from the standard stated in this paragraph. If a sub-floor delaminates or swells to the extent that it affects the flooring covering as stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(3) Sub-flooring shall not have excessive humps, ridges, depressions or slope within any room that equals or exceeds 3/8 of an inch in any 32-inch direction. If the sub-flooring fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(d) Performance Standards for Stairs.

(1) Stair steepness and dimensions such as tread width, riser height, landing size and stairway width, shall comply with the Code. If stair steepness and dimensions do not comply with the Code, the builder shall take such action as is necessary to bring the variance within the standard stated in this paragraph.

(2) Under normal residential use, stairs shall not make excessive squeaking or popping sounds. If stairs make excessive squeaking and popping sounds under normal residential use, the builder shall take such action as is necessary to bring the variance within the standard stated in this paragraph.

§304.12. Performance Standards for Drywall.

(a) A drywall surface shall not have a bow or depression that equals or exceeds 1/4 of an inch out of line within any 32-inch horizontal measurement as measured from the center of the bow or depression or 1/2 of an inch within any eight-foot vertical measurement. If a drywall surface fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(b) A ceiling made of drywall shall not have bows or depressions that equal or exceed 1/2 of an inch out of line within a 32-inch measurement as measured from the center of the bow or depression running parallel with a ceiling joist or within 1/2 of an inch deviation from the plane of the ceiling within any eight-foot measurement. If a drywall ceiling fails to meet the standard stated in this subsection,

the builder shall take such action as is necessary to bring the variance within the standard.

(c) A drywall surface shall not have a crack such that any crack equals or exceeds 1/32 of an inch in width at any point along the length of the crack. If a drywall surface has a crack that exceeds the standard in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(d) Crowning at a drywall joint shall not equal or exceed 1/4 of an inch within a twelve-inch measurement centered over the drywall joint. If crowning at a drywall joint exceeds the standards stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard. Crowning occurs when a drywall joint is higher than the plane of the drywall board on each side.

(e) A drywall surface shall not have surface imperfections such as blisters, cracked corner beads, seam lines, excess joint compound or trowel marks that are visible from a distance of six feet or more in normal light. If a drywall surface fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(f) A drywall surface shall not be out of level (horizontal), plumb (vertical) or square (perpendicular at a 90-degree angle) such that there are variations in those measurements to wall or surface edges at any opening, corner, sill, shelf, etc. shall not equal or exceed 3/8 of an inch in any 32-inch measurement along the wall or surface.

(1) If a drywall surface fails to meet the standard stated in subsection (f) of this section, the builder shall take such action as is necessary to bring the variance within the standard.

(2) This standard shall not apply to remodeling projects where existing conditions do not permit the builder to achieve the performance standard. At or about the time of discovery of such a preexisting condition, a remodeler shall notify the homeowner, in writing, of any existing condition that prevents achievement of the standard.

(g) Nails or screws shall not be visible in a drywall surface. If nails or screws are visible, the builder shall take such action as is necessary to bring the variance within the standard.

§304.13. Performance Standards for Insulation.

(a) Insulation shall be installed in the walls, ceilings and floors of a home in accordance with the building plan and specifications and the Code. If the insulation in walls, ceilings or floors is not in accordance with the building plans and specifications and the Code, the builder shall take such action as is necessary to bring the variance within the standard stated in this subsection.

(b) Blown insulation in the attic shall not displace or settle so that it reduces the R-value below manufacturer's specifications, the building plans and the Code. If the blown insulation in the attic reduces, settles or is displaced to the extent that the R-value is below the manufacturer's specifications, the building plans and Code, the builder shall take such action as is necessary to bring the variance within the standard stated in this subsection.

(c) A gap equal to or in excess of 1/4 of an inch between insulation batts or a gap between insulation batts and framing members is not permitted. If a gap equal to or greater than 1/4 of an inch occurs between insulation batts or a gap occurs between an insulation batt and a framing member, the builder shall take such action as is necessary to bring the variance within the standard stated in this subsection.

(d) Insulation shall not cover or block a soffit vent to the extent that it blocks the free flow of air. If the insulation covers or blocks the soffit vent, the builder shall take such action as is necessary to bring the variance within the standard stated in this subsection.

§304.14. Performance Standards for Exterior Siding and Trim.

(a) Performance Standards for Exterior Siding.

(1) Exterior siding shall be equally spaced and properly aligned. Horizontal siding shall not equal or exceed 1/2 of an inch off parallel with the bottom course or 1/4 of an inch off parallel with the adjacent course from corner to corner. If siding is misaligned or unevenly spaced and fails to meet the performance standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(2) Siding shall not gap or bow. A siding end joint shall not have a gap that equals or exceeds 1/4 of an inch in width. Siding end joint gaps shall be caulked. A bow in siding shall not equal or exceed 3/8 of an inch out of line in a 32-inch measurement. If siding has gaps or bows that exceed the standards stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(3) Nails shall not protrude from the finished surface of siding but nail heads may be visible on some products where allowed by the manufacturer's specifications. If a nail protrudes from the finished surface of siding, the builder shall take such action as is necessary to bring the variance within the standard stated in this paragraph.

(4) Siding shall not have a nail stain. If siding has a nail stain, the builder shall take such action as is necessary to bring the variance within the standard stated in this paragraph.

(5) Siding and siding knots shall not become loose or fall off. If siding or siding knots become loose or fall off, the builder shall take such action as is necessary to bring the variance within the standard stated in this paragraph.

(6) Siding shall not delaminate. If siding fails to comply with the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(7) Siding shall not cup in an amount equal to or exceeding 1/4 of an inch in a six-foot run. If siding fails to comply with the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(8) Siding shall not have cracks or splits that equal or exceed 1/8 of an inch in width. If siding fails to comply with the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(b) Performance Standards for Exterior Trim.

(1) A joint between two trim pieces shall not have a separation at the joint equal to or exceeding 1/4 of an inch in width and all trim joints shall be caulked. If there is a separation at a trim joint that fails to comply with the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(2) Exterior trim and eave block shall not warp in an amount equal to or exceeding 1/2 of an inch in an eight-foot run. If exterior trim or eave block warps in excess of the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(3) Exterior trim and eave block shall not cup in an amount equal to or in excess of a 1/4 of an inch in a six-foot run. If exterior trim or eave block cups in excess of the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(4) Exterior trim and eave block shall not have cracks or splits equal to or in excess of 1/8 of an inch in average width. If exterior

trim or eave block has cracks in excess of the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(5) Trim shall not have nails that completely protrude through the finished surface of the trim but nail heads may be visible on some products.

(A) If a nail protrudes from the finished surface of the trim, the builder shall take such action as is necessary to bring the variance within the standard within the standard stated in paragraph (5) of this subsection.

(B) Some products specify that the nails be flush with the trim surface. When these products are used, visible nail heads are not considered protruding nails as long as they are painted over.

(6) Trim shall not have a nail stain. If trim has a nail stain, the builder shall take such action as is necessary to bring the variance within the standard stated in this paragraph.

§304.15. Performance Standards for Masonry including Brick, Block and Stone.

(a) A masonry wall shall not bow in an amount equal to or in excess of one inch when measured from the base to the top of the wall.

(1) If a masonry wall fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(2) The standard set forth in this subsection does not apply to natural stone products.

(b) A masonry unit or mortar shall not be broken or loose. If a masonry unit or mortar fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(c) A masonry mortar crack shall not equal or exceed 1/8 of an inch in width. If a crack in masonry mortar fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(d) A masonry unit or mortar shall not deteriorate. If a masonry unit or mortar fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(e) Masonry shall not have dirt, stain or debris on the surface due to construction activities. If masonry fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(f) A gap between masonry and adjacent material shall not equal or exceed 1/4 of an inch in average width and all such gaps shall be caulked. If a gap between masonry and adjacent material fails to meet the standards stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(g) Mortar shall not obstruct a functional opening, such as a vent, weep hole or plumbing cleanout.

(1) If the mortar obstructs a functional opening, the builder shall take such action as is necessary to bring the variance within the standard stated in this subsection.

(2) The homeowner shall not put any material into weep holes. Weep holes are an integral part of the wall drainage system and must remain unobstructed.

§304.16. Performance Standards for Stucco.

(a) Stucco surfaces shall not be excessively bowed, uneven, or wavy.

(1) If a stucco surface fails to perform as stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(2) This standard shall not apply to decorative finishes.

(b) Stucco shall not be broken or loose. If stucco is broken or loose, the builder shall take such action as is necessary to bring the variance within the standard stated in this subsection.

(c) Stucco shall not have cracks that equal or exceed 1/8 of an inch in width at any point along the length of the crack.

(1) If the stucco fails to perform as stated in subsection (c) of this section, the builder shall take such action as is necessary to bring the variance within the standard.

(2) The builder shall not be responsible for repairing cracks in stucco caused by the homeowner's actions, including the attachment of devices to the stucco surface, such as, but not limited to, patio covers, plant holders, awnings and hose racks.

(d) Stucco shall not deteriorate excessively.

(1) If the stucco deteriorates excessively, the builder shall take such action as is necessary to bring the variance within the standard.

(2) The homeowner shall not allow water from irrigation systems to contact stucco finishes excessively.

(e) Stucco shall not have dirt, stain or debris on surface due to construction activities. If the stucco fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(f) Stucco surfaces shall not have imperfections that are visible from a distance of six feet under normal lighting conditions that disrupt the overall uniformity of the finished pattern. If the stucco fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(g) The lath shall not be exposed. If the lath is exposed, the builder shall take such action as is necessary to bring the variance within the standard stated in this subsection.

(h) A separation between the stucco joints shall not equal or exceed 1/16 of an inch in width. If a separation between the stucco joints occurs in excess of the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(i) A separation between a stucco surface and adjacent material shall not equal or exceed 1/4 of an inch in width and all separations shall be caulked. If a separation occurs between a stucco surface and adjacent material occurs in excess of the standard stated in this subsection or if such a separation is not caulked, the builder shall take such action as is necessary to bring the variance within the standard.

(j) Stucco shall not obstruct a functional opening, such as a vent, weep hole or plumbing cleanout. If stucco obstructs a functional opening, the builder shall take such action as is necessary to bring the variance within the standard stated in this subsection.

(k) Stucco screed shall have a minimum clearance of at least 4 inches above the soil or landscape surface and at least 2 inches above any paved surface. If the stucco screed clearance does not meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(l) Exterior Installation Finish Systems (EIFS) stucco screed shall clear any paved or unpaved surface by 6 inches. If the EIFS stucco screed clearance does not meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

§304.17. Performance Standards for Roofs.

(a) Flashing shall prevent water penetration.

(1) If the flashing fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(2) The builder shall not be responsible for leaks caused by extreme weather.

(b) The roof shall not leak.

(1) If the roof fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(2) The builder shall not be responsible for leaks caused by extreme weather.

(3) The homeowner shall perform periodic maintenance to prevent leaks due to build-up of debris, snow or ice. The homeowner shall take such action as is necessary to prevent downspouts and gutters from becoming clogged.

(c) A vent, louver or other installed attic opening shall not leak.

(1) If a vent, louver or other installed attic opening fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(2) The builder shall not be responsible for leaks caused by extreme weather.

(d) A gutter or downspout shall not leak or retain standing water. After cessation of rainfall, standing water in an unobstructed gutter shall not equal or exceed 1/2 of an inch in depth.

(1) If a gutter or downspout fails to meet the standard in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(2) The builder shall not be responsible for leaks caused by extreme weather.

(3) The homeowner shall maintain and clean gutters and downspouts to prevent buildup of debris or other obstructions.

(e) Shingles, tiles, metal or other roofing materials shall not become loose or fall off in wind speeds less than those set forth in the manufacturer's specifications. If the shingles, tiles, metal or other roofing materials fail to meet the standard in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(f) A skylight shall not leak. If a skylight fails to meet the standard in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(g) Water shall drain from a built-up roof within two hours after cessation of rainfall. The standard does not require that the roof dry completely within the time period. If the built-up roof fails to meet the standard in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(h) A roof tile shall not be cracked or broken. No shingle shall be broken so that it detracts from the overall appearance of the home. If roof tiles or shingles fail to meet the standard in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(i) A pipe, vent, fireplace or other object designed to penetrate the roof shall not be located within the area of roof valley centerline without proper "cricketing" or other Code-approved water diversion methods. If a pipe, vent, fireplace or other object designed to penetrate the roof is not correctly located as provided in the performance standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(j) The exterior moisture barrier of the roof shall not allow moisture penetration.

(1) If the exterior moisture barrier fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(2) The homeowner shall not make penetrations through exterior moisture barrier of the roof.

§304.18. Performance Standards for Doors and Windows.

(a) Performance Standards for Both Doors and Windows.

(1) When closed, a door or window shall not allow excessive infiltration of air or dust. If a door or window fails to meet the performance standard stated in this paragraph the builder shall take such action as is necessary to bring the variance within the standard.

(2) When closed, a door or window shall not allow excessive accumulation of moisture inside the door or window.

(A) If a door or window fails to meet the performance standard stated in paragraph (2) of this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(B) The homeowner shall keep weep holes on windows and doors free of dirt buildup and debris, thereby allowing water to drain properly.

(C) Most door and window assemblies are designed to open, close and weep moisture--allow condensation or minor penetration by the elements to drain outside.

(3) Glass in doors and windows shall not be broken due to improper installation or construction activities. If glass in a window or door is broken due to improper installation or construction activities, the builder shall take such action as is necessary to bring the variance within the standard stated in this paragraph.

(4) A screen in a door or window shall fit properly and shall not be torn or damaged due to construction activities. A screen shall not have a gap equal to or exceeding 1/4 of an inch between the screen frame and the window frame. If a screen in a door or window fails to meet the performance standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(5) There shall be no condensation between window and door panes in a sealed insulated glass unit.

(A) If a window or door fails to meet the performance standard stated in paragraph (5) of this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(B) The homeowner shall not apply a tinted window film or coating to window or door panes in sealed insulated glass units.

(6) A door or window latch or lock shall close securely and shall not be loose or rattle. If a door, window latch or lock fails to meet

the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(7) A door or window shall operate easily and smoothly and shall not require excessive pressure when opening or closing. If a door or window fails to meet the performance standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(8) A door or window shall be painted or stained according to the manufacturers' specifications. If a window or door fails to meet the performance standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(b) Performance Standards for Windows. A double hung window shall not move more than two inches when put in an open position. If a window fails to meet the performance standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(c) Performance Standards for Doors.

(1) A sliding door and door screen shall stay on track.

(A) If a sliding door or door screen fails to perform to the standard stated in paragraph (1) of this subsection, builder shall take such action as is necessary to bring the variance within the standard.

(B) The homeowner shall clean and lubricate sliding door or door screen hardware as necessary.

(2) The spacing between an interior door bottom and original floor covering, except closet doors, shall not exceed 1.5 inches and shall be at least 1/2 of an inch. The spacing between an interior closet door bottom and original floor covering shall not exceed two inches and shall be at least 1/2 of an inch. If the spacing between a door bottom and the original floor covering does not meet the performance standards stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(3) A door shall not delaminate. If a door becomes delaminated, a builder shall take such action as is necessary to bring the variance within the standard stated in this paragraph.

(4) A door panel shall not split so that light from the other side is visible. If a door panel fails to meet the performance standards stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(5) A door shall open and close without binding. If a door fails to perform in accordance with the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(6) A door shall not warp to the extent that it becomes inoperable. A warp in a door panel shall not equal or exceed 1/4 of an inch from original dimension measured vertically, horizontally or diagonally from corner to corner. If a door fails to perform in accordance with the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(7) A storm door shall open and close properly and shall fit properly. If a door fails to perform in accordance with the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(8) When a door is placed in an open position, it shall remain in the position it was placed, unless the movement is caused by airflow. If a door fails to perform in accordance with the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(9) A metal door shall not be dented or scratched due to construction activities. If a metal door fails to comply with the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(d) Performance Standards for Garage Doors.

(1) A metal garage door shall not be dented or scratched due to construction activities. If a metal garage door fails to comply with the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(2) A garage door opener, if provided, shall operate properly in accordance with manufacturer's specifications.

(A) If a garage door opener fails to perform in accordance with the standard stated in paragraph (2) of this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(B) A homeowner shall maintain tracks, rollers and chains and shall not block or bump sensors to electric garage door openers.

(3) A garage door shall not allow excessive water to enter the garage and the gap around the garage door shall not equal or exceed 1/2 of an inch in width. If a garage door allows excessive water to enter the garage or the gap around the garage door equals or exceeds 1/2 of an inch, the builder shall take such action as is necessary to bring the variance within the standard stated in this paragraph.

(4) A garage door spring shall operate properly and shall not lose appreciable tension, break or be undersized. If a garage door spring fails to perform in accordance with the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(5) A garage door shall remain in place at any open position, operate smoothly and not be off track. If a garage door fails to perform in accordance with the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

§304.19. Performance Standards for Interior Flooring.

(a) Performance Standards for Carpet, Vinyl Flooring and Wood Flooring. Performance standards for ceramic tile, flagstone, marble, granite, slate, quarry tile other hard surface floors, except finished concrete floors, are located in §304.20 of this subchapter.

(b) Performance Standards for Carpet.

(1) Carpet shall not wrinkle and shall remain tight, lay flat and be securely fastened. If the carpet fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(2) Carpet seams shall be smooth without a gap or overlap. If the carpet fails to meet the standards stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(3) Carpet shall not be stained or spotted due to construction activities. If the carpet fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(c) Performance Standards for Finished Concrete Floor.

(1) A finished slab, located in a living space that is not otherwise designed for drainage, shall not have pits, depressions or unevenness that equals or exceeds 3/8 of an inch in any 32 inches.

(A) If a finished concrete slab in a living space fails to meet the standard stated in paragraph (1) of this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(B) Finished concrete slabs in living spaces that are designed for drainage, such as a laundry room, are excepted from the standards stated in paragraph (1) of this subsection.

(2) Finished concrete slabs in living spaces shall not have separations, including joints, and cracks that equal or exceed 1/8 of an inch in width or 1/16 of an inch in vertical displacement. If a finished concrete slab in a living space fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(d) Performance Standards for Wood Flooring.

(1) Wood flooring shall not have excessive humps, depressions or unevenness that equals or exceeds 3/8 of an inch in any 32-inch direction within any room. If wood flooring fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(2) Wood flooring shall remain securely attached to the foundation or sub-floor unless the wood flooring is designed to be installed without nails, glue, adhesives or fasteners. If wood flooring fails to meet the standards of this, the builder shall take such action as is necessary to bring the variance within the standard.

(3) Wood flooring shall not have open joints and separations that equal or exceed 1/8 of an inch.

(A) If wood flooring fails to meet the standards of paragraph (3) of this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(B) These standards do not apply to non-hardwood species that contain greater moisture and may shrink after installation or structural floors that are designed to serve as the finished floor. If the floor is designed as a structural finish floor, the builder must provide a written explanation of the characteristics of that floor to the homeowner prior to the execution of the contract.

(4) Strips of floorboards shall not cup in an amount that equals or exceeds 1/16 of an inch in height in a three-inch distance when measured perpendicular to the length of the board.

(A) If the wood flooring fails to meet the standard stated in paragraph (4) of this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(B) This standard does not apply to non-hardwood species that typically shrink after installation or structural floors that are designed to serve as the finished floor. If the floor is designed as a structural finish floor, the builder must provide a written explanation of the characteristics of that floor to the homeowner.

(5) Unless installed as a specialty feature, wood flooring shall not have excessive shade changes or discoloration due to the construction activities of the builder. If the wood floor fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(6) Unless installed as a specialty feature, wood flooring shall not be stained, spotted or scratched due to construction activities of the builder. If wood flooring fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(e) Performance Standards for Vinyl Flooring.

(1) Vinyl flooring shall be installed square to the most visible wall and shall not vary by 1/4 of an inch in any six-foot run. If the vinyl flooring fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(2) The seam alignment in vinyl flooring shall not vary such that the pattern is out of alignment in an amount that equals or exceeds 1/8 of an inch. If the vinyl flooring fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(3) Vinyl flooring shall remain securely attached to the foundation or sub-floor. If the vinyl flooring fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(4) A vinyl floor shall not have a depression that equals or exceeds 1/2 of an inch in any six-foot run. If a vinyl floor has a depression that exceeds the standard stated in this paragraph and the depression is due to construction activities, the builder shall take such action as is necessary to bring the variance within the standard.

(5) A vinyl floor shall not have a ridge that equals or exceeds 1/2 of an inch when measured as provided in this paragraph. The ridge measurement shall be made by measuring the gap created when a six-foot straight edge is placed tightly three inches on each side of the defect and the gap is measured between the floor and the straight edge at the other end. If a vinyl floor has a ridge that fails to comply with the standard stated in this paragraph and the ridge is due to construction activities, the builder shall take such action as is necessary to bring the variance within the standard.

(6) Vinyl floor shall not be discolored, stained or spotted due to the construction activities of the builder. If the vinyl floor fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(7) Vinyl flooring shall not be scratched, gouged, cut or torn due to construction activities. If the vinyl flooring fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(8) Debris, sub-floor seams, nails and/or screws shall not be detectable under the vinyl floor from a distance of three feet or more in normal light. If the vinyl flooring fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(9) Sub-flooring shall not cause vinyl flooring to rupture. If vinyl flooring fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(10) A seam in vinyl flooring shall not have a separation that equals or exceeds 1/16 of an inch in width. Where dissimilar materials abut, there shall not be a gap equal to or greater than 1/8 of an inch. If vinyl flooring fails to meet the standards stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

§304.20. Performance Standards for Hard Surfaces, including Ceramic Tile, Flagstone, Marble, Granite, Slate, Quarry Tile, Finished Concrete or Other Hard Surfaces.

(a) Performance Standards for Hard Surfaces Generally.

(1) A hard surface shall not break or crack due to construction activities. If a hard surface is cracked or broken due to construction activities, the builder shall take such action as is necessary to bring the variance within the standard.

(2) A hard surface shall remain secured to the substrate. If a hard surface fails to perform in accordance with the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(3) A surface imperfection in floor hard surface shall not be visible from a distance of three feet or more in normal light. A surface imperfection in non-floor hard surface shall not be visible from a distance of two feet or more in normal light. If a hard surface fails to meet the standards stated in this paragraph due to construction activities, the builder shall take such action as is necessary to bring the variance within the standard.

(4) Color variations between field hard surfaces and trim hard surfaces should not vary excessively due to construction activities.

(A) If color variations between field and trim hard surfaces are excessive and are due to construction activities, the builder shall take such action as is necessary to bring the variance within the standard stated in paragraph (4) of this subsection.

(B) Natural products such as flagstone, marble, granite, slate and other quarry tile will have color variation.

(5) Hard surface areas shall not leak. If a hard surface area fails to perform in accordance with the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(6) The surfaces of two adjacent hard surfaces shall not vary in an amount equal to or exceeding 1/16 of an inch displacement at a joint, with the exception of transition trim pieces. If a joint between two hard surfaces fails to meet the performance standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(7) Hard surface layout or grout line shall not be excessively irregular.

(A) If hard surface layouts or grout lines fail to meet the performance standard stated in paragraph (7) of this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(B) Natural products such as flagstone, marble, granite, slate, and other quarry tile will have size variations that may create irregular layouts or grout lines.

(8) Hard surface countertops shall be level to within 1/4 of an inch in any six-foot measurement. If a hard surface countertop is not level to within the standards stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(b) Performance Standards for Grout.

(1) Grout shall not crack or deteriorate. If grout fails to meet the performance standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(2) Grout shall not change shade or discolor excessively due to construction activities. If grout fails to perform to the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(c) Performance Standards for Concrete Countertops.

(1) A concrete countertop shall not have excessive pits, depressions, or unevenness that equal or exceed 1/8 of an inch in any 32-inch measurement. If a concrete countertop fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(2) A concrete countertop shall not have separations or cracks equal to or exceeding 1/16 of an inch in width or 1/64 of an inch in vertical displacement. If a concrete countertop fails to meet the standards stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(3) A finished concrete countertop shall not be stained, spotted or scratched due to construction activities. If a concrete countertop fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(4) A concrete countertop shall not have a chipped edge that extends beyond 1/16 of an inch from the edge of the countertop due to construction activities. If a concrete countertop fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(5) A concrete countertop shall not change shade or discolor excessively due to construction activities. If a concrete countertop fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

§304.21. Performance Standards for Painting, Stain and Wall Coverings.

(a) Performance Standards for Caulking. Interior caulking shall not deteriorate or crack excessively. If the interior caulking fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(b) Performance Standards for Painting and Stain.

(1) Paint or stain shall not have excessive color, shade or sheen variation.

(A) If the paint or stain fails to meet the standard stated in paragraph (1) of this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(B) This standard shall not apply to stained woodwork.

(2) Paint shall cover all intended surfaces so that unpainted areas shall not show through paint when viewed from a distance of six feet in normal light. If the painting fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(3) Interior paint or stain shall not deteriorate. If paint or stain fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(4) Exterior paint or stain shall not deteriorate excessively. If paint or stain fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(5) Paint over-spray shall not exist on any surface for which it was not intended. If the paint is sprayed onto a surface for which it was not intended, the builder shall take such action as is necessary to bring the variance within the standard stated in this paragraph.

(6) Interior varnish, polyurethane or lacquer finish shall not deteriorate. If an interior finish fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to

bring the variance within the standard. If an interior finish fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(7) Exterior varnish, polyurethane or lacquer finishes shall not deteriorate excessively.

(A) If an exterior finish fails to meet the standard stated in paragraph (7) of this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(B) Exterior varnish, polyurethane or lacquer finishes that are subject to direct sunlight are excluded from this standard.

(8) Interior painted, varnished or finished surface shall not be scratched, dented, nicked or gouged due to construction activities. If interior painted, varnished or finished surfaces fail to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(9) A paint product shall perform as represented by the manufacturer to meet manufacturer's specifications for washability and/or scrubability. If the paint product fails to meet the standards of this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(c) Performance Standards for Wall Coverings.

(1) A wall covering shall be properly secured to the wall surface and shall not peel or bubble. If a wall covering fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(2) Pattern repeats in wall coverings shall match. Wall coverings shall be installed square to the most visible wall. Pattern repeats shall not vary in an amount equal to or exceeding 1/4 of an inch in any six-foot run. If the wall covering fails to meet the standards stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(3) A wall covering seam shall not separate or gap. If the wall covering fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(4) Lumps or ridges in a wall covering shall not be detectable from a distance of six feet or more in normal light. If the appearance of the wall covering fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(5) Wall coverings shall not be discolored, stained or spotted due to construction activities. If a wall covering fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(6) Wall coverings shall not be scratched, gouged, cut or torn due to construction activities. If a wall covering fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(7) Wall coverings shall perform as represented by the manufacturer to meet manufacturer's specifications for washability and/or scrubability. If a wall covering fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

§304.22. Performance Standards for Plumbing.

(a) Performance Standards for Plumbing Accessories.

(1) A fixture surface shall not have a chip, crack, dent or scratch due to construction activities. If a fixture fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(2) A fixture shall not have tarnish, blemishes or stains unless installed as a specialty feature.

(A) If a fixture fails to meet the standard stated in paragraph (2) of this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(B) Fixture finishes that are tarnished, blemished or stained due to high iron, manganese or other mineral content in water are excluded from this standard.

(3) A fixture or fixture fastener shall not corrode.

(A) If a fixture or fixture fastener fails to meet the standards of paragraph (3) of this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(B) A builder is not responsible for corrosion caused by factors beyond the manufacturer's or the builder's control, including the homeowner's use of corrosive chemicals or cleaners or corrosion caused by water content.

(4) A decorative gas appliance shall be installed in accordance with manufacturer's specifications and when so installed shall function in accordance with manufacturer's representations. If a decorative gas appliance fails to meet the standards stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(5) Fixtures shall be secure and not loose.

(A) If a fixture fails to meet the standard stated in paragraph (5) of this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(B) The homeowner shall not exert excessive force on a fixture.

(6) A fixture stopper shall operate properly and shall retain water in accordance with the manufacturer's specifications. If a fixture stopper fails to meet the standards stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(7) The toilet equipment shall not allow water to run continuously.

(A) If the toilet equipment fails to meet the standard stated in paragraph (7) of this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(B) If toilet equipment allows water to run continuously, the homeowner shall shut off the water supply or take such action as is necessary to avoid damage to the home.

(8) A toilet shall be installed and perform in accordance with the manufacturer's specifications.

(A) If a toilet fails to meet the standard stated in paragraph (8) of this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(B) In the event of water spillage, the homeowner shall shut off the water supply and take such action as is necessary to avoid damage to the home.

(9) A tub or shower pan shall not crack. If a tub or shower pan fails to meet the standard stated in this paragraph, the builder shall

take such action as is necessary to bring the variance within the standard.

(10) A tub or shower pan shall not squeak excessively. If a tub or shower pan fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(11) A water heater shall be installed and secured according to the manufacturer's specifications and the Code. If a water heater fails to meet the standards stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(12) A waste disposal unit shall be installed and operate according to the manufacturer's specifications. If a waste disposal unit fails to meet the standards stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(13) A faucet or fixture shall not drip or leak. This standard does not include drips or leaks due to debris or minerals from the water source, unless it is due to construction activities. If a faucet or fixture fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(14) A sump pump shall be installed in accordance with the manufacturer's specifications and shall operate properly when so installed. If a sump pump fails to meet the standards stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(b) Performance Standards for Pipes and Vents.

(1) A sewer gas odor originating from the plumbing system shall not be detectable inside the home under conditions of normal residential use.

(A) If a sewer gas odor is detected inside the home under conditions of normal residential use, the builder shall take such action as is necessary to bring the variance within the standard.

(B) The homeowner shall keep plumbing traps filled with water.

(2) A vent stack shall be free from blockage and shall allow odor to exit the home. If a vent stack fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(3) A water pipe shall not make excessive noise such as banging or hammering repeatedly.

(A) If a water pipe fails to meet the standard stated in paragraph (3) of this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(B) A water pipe subject to expansion or contraction of the pipe as warm or cool water flows through the pipe may cause a "ticking" sound temporarily. The standard stated in paragraph (3) of this subsection does not require a builder to remove all noise attributable to water flow and pipe expansion.

§304.23. Performance Standards for Heating, Cooling and Ventilation.

(a) Performance Standards for Heating and Cooling.

(1) A condensation line shall not be obstructed due to construction activities.

(A) If a condensation line fails to meet the standard stated in paragraph (1) of this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(B) The homeowner shall periodically check for the free flow of condensate (water) from the line and clear the line when necessary.

(2) A drip pan and drain line shall be installed under a horizontal air handler as per the Code.

(A) If a drip pan and drain line fails to meet the standard stated in paragraph (2) of this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(B) The homeowner shall periodically check for the free flow of condensate (water) from the line and clear the line when necessary.

(3) Insulation shall completely encase the refrigerant line according to Code.

(A) If the refrigerant line insulation fails to meet the standard stated in paragraph (3) of this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(B) The homeowner shall ensure that insulation on the refrigerant line is not damaged or cut due to home maintenance or landscape work.

(4) An exterior compressor unit shall be installed on a stable pad that supports the unit and is no more than one inch out of level. The bottom of the exterior compressor unit support shall not be below ground level.

(A) If an exterior compressor unit pad or support fails to meet the standards stated in paragraph (4) of this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(B) The homeowner shall ensure that settlement of the exterior compressor unit pad does not occur due to home maintenance, landscape work or excessive water from irrigation.

(b) Performance Standards for Venting.

(1) An appliance shall be vented according to the manufacturer's specifications. If an appliance is not vented in accordance with the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(2) Back draft dampers shall be installed and function according to the manufacturer's specifications. If back draft dampers fail to meet the standards stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(c) Performance Standards for Ductwork. Ductwork shall not make excessive noise.

(1) If the ductwork fails to meet the standard stated in of this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(2) The flow of air, including its velocity, or the expansion of ductwork from heating and cooling may cause "ticking" or "crackling" sounds.

(3) The homeowner shall not place any object on the ductwork.

§304.24. Performance Standards for Electrical Systems and Fixtures.

(a) Excessive air infiltration shall not occur around electrical system components or fixtures. If electrical system components or fixtures fail to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(b) A fixture or trim plate shall not be chipped, cracked, dented or scratched due to construction activities. If a fixture or trim plate fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(c) A fixture or trim plate finish shall not be tarnished, blemished or stained due to construction activities. If a fixture or trim fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(d) A fixture, electrical box or trim plate shall be installed in accordance with the Code and shall be plumb and level. If a fixture, electrical box or trim plate fails to meet the standards stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(e) Fixtures, such as lights, fans and appliances shall operate properly when installed in accordance with the manufacturer's specifications. The builder shall take such action as is necessary to bring the variance within the standard stated in this subsection.

(f) A smoke detector shall operate according to the manufacturer's specifications and shall be installed in accordance with the Code. If a smoke detector fails to meet the standards stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(g) An exhaust fan shall operate within the manufacturer's specified noise level. If an exhaust fan fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

§304.25. Performance Standards for Interior Trim.

(a) Performance Standards for Trim.

(1) An interior trim joint separation shall not equal or exceed 1/8 of an inch in width and all joints shall be caulked or puttied. If an interior trim joint fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(2) The interior trim shall not have surface damage, such as scratches, chips, dents, gouges, splits, cracks, warping or cupping that is visible from a distance of six feet or more in normal light due to construction activities. If the interior trim fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(3) A hammer mark on trim shall not be visible from a distance of six feet or more when viewed in normal light. If the interior trim fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(4) A nail or nail hole in interior trim shall not be visible from a distance of six feet or more when viewed in normal light. If the interior trim fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(b) Performance Standards for Shelving. Shelving, rods and end supports shall be installed in accordance with the measurements stated in this subsection. The length of a closet rod shall not be shorter than the actual distance between the end supports in an amount equal to or exceeding 1/4 of an inch and shall be supported by stud-mounted brackets no more than four feet apart. The length of a shelf shall not be shorter than the actual distance between the supporting walls by an amount equal to or exceeding 1/4 of an inch and shall be supported by stud-mounted brackets no more than four feet apart. End supports shall be securely mounted. If the closet rods, shelving or end supports fail to meet the standards stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

§304.26. Performance Standards for Mirrors, Interior Glass and Shower Doors.

(a) A mirror, interior glass or shower door shall not be loose and shall be securely mounted or attached to the supporting surface. Fixtures, such as towel bars or door handles, shall be securely mounted. If a mirror, interior glass, shower door, fixture or component fails to meet the standards stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(b) A mirror, interior glass or shower door shall not be damaged due to construction activities. If a mirror, interior glass or shower door fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(c) A shower door shall not leak. If a shower door fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(d) Imperfections in a mirror or shower door shall not be visible from a distance of two feet or more when viewed in normal light. If a mirror or shower door fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(e) When opening and closing, a shower door shall operate easily and smoothly without requiring excessive pressure. If a shower door fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

§304.27. Performance Standards for Hardware and Ironwork.

(a) Performance Standards for Hardware.

(1) Hardware finishes shall not be tarnished, blemished, corroded or stained due to construction activities, unless the finish is installed as a specialty feature.

(A) If the hardware finish fails to meet the standard stated in paragraph (1) of this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(B) The builder is not responsible for tarnished, blemished, or stained hardware finishes that have been damaged by factors that are beyond the manufacturer's or the builder's control such as the homeowner's use of abrasive pads or cleaners, harsh chemicals, alcohol, organic solvents or deterioration caused by exposure to outdoor elements such as salt air or humidity.

(2) Hardware shall function properly, without catching binding or requiring excessive force to operate. If hardware fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(3) Hardware shall not be scratched, chipped, cracked or dented due to construction activities. If hardware fails to meet the standards stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(4) Hardware shall be installed securely and shall not be loose.

(A) If hardware fails to meet the standards stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(B) The homeowner shall not exert excessive force on hardware.

(b) Performance Standards for Interior Ironwork.

(1) Interior ironwork shall not rust.

(2) If interior ironwork fails to meet the standard stated in paragraph (1) of this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(3) The builder is not responsible for ironwork finishes that rust due to factors that are beyond the manufacturer's or the builder's control such as the homeowner's use of abrasive pads or cleaners, harsh chemicals, alcohol, organic solvents or deterioration caused by exposure to humidity.

§304.28. Performance Standards for Countertops and Backsplashes.

(a) Performance Standards for Countertops and Backsplashes Generally.

(1) A countertop or backsplash shall be secured to substrate in accordance with manufacturer's specifications. If countertop or backsplash materials are not secured to the substrate in accordance with the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(2) For non-laminate countertops and backsplashes, the joints between countertop surfaces, between the countertop surface and the backsplash or side-splash and between adjoining backsplash panels may be visible, but shall not separate. If joints between non-laminate surfaces fail to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(3) Countertops shall be level to within 1/4 of an inch in any six-foot measurement. If a countertop surface fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(4) A countertop surface or edge shall not be damaged, broken, chipped or cracked due to construction activities. If a countertop surface or edge fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(5) A countertop shall not bow or warp in an amount equal to or exceeding 1/16 of an inch per lineal foot. If a countertop fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(b) Performance Standards for Laminate Countertops and Backsplashes.

(1) Laminate countertops and backsplashes shall not delaminate and shall remain securely attached to the substrate. Delamination is the separation of the finish surface veneer from the substrate material. If a countertop fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(2) A seam in a laminate countertop or backsplash may be visible but shall not be separated or displaced. If a laminate countertop or backsplash fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(3) A surface imperfection in a laminate countertop or a backsplash shall not be visible from a distance of three feet or more when viewed in normal light due to construction activities. If a laminate surface fails to meet the standards stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

§304.29. Performance Standards for Fireplaces.

(a) A refractory panel shall not crack or separate.

(1) If the fireplace refractory panel fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(2) The homeowner shall not use synthetic logs or other materials if not approved by the manufacturer.

(b) A fireplace door shall operate properly. Fireplace doors shall meet evenly and shall not be out of alignment from one another in an amount equal to or exceeding 1/8 of an inch in any direction. If a fireplace door fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(c) A fireplace shall not have a gas leak. If a fireplace has a gas leak, the builder shall take such action as is necessary to bring the variance within the standard stated in this subsection.

(d) Gas logs shall be positioned in accordance with the manufacturer's specifications.

(1) If a gas log fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(2) The homeowner shall not incorrectly reposition or relocate the logs after the original placement. The homeowner shall not place the logs in a manner that does not allow the flame to flow through the logs according to the manufacturer's specifications.

(e) A crack in masonry hearth or facing shall not be equal to or exceed 1/4 of an inch in width. If the masonry hearth or facing of the fireplace fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(f) A fireplace or chimney shall draw properly. If a fireplace or chimney fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(g) A firebox shall not have excessive water infiltration under normal weather conditions. If a firebox fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(h) A fireplace fan shall not exceed the noise level established by the manufacturer's specifications. If a fireplace fan fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

§304.30. Performance Standards for Irrigation Systems.

(a) An irrigation system shall not leak, break or clog due to construction activities. If an irrigation system fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(b) An irrigation system shall be installed such that sprinkler coverage shall be complete and water shall not spray an unintended area due to construction activities. If an irrigation system fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(c) The irrigation system control shall operate in accordance with manufacturer's specifications.

(1) If an irrigation system fails to operate in accordance with manufacturer's specifications, the builder shall take such action as is necessary to bring the variance within the standard stated in this subsection.

(2) The builder shall provide the homeowner with instructions on the operation of the irrigation system at closing.

§304.31. Performance Standards for Fencing.

(a) A fence shall not fall over and shall not lean in excess of two inches out of plumb due to construction activities. If the fencing fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(b) A wood fence board shall not be broken due to construction activities. Wood fence board shall not become detached from the fence due to construction activities of the builder. If the fencing fails to meet the standards stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(c) A masonry unit or mortar in a fence shall not be broken or loose. A crack in a masonry unit shall not occur. A crack in the mortar shall not equal or exceed 1/8 of an inch in width. If a masonry unit or mortar in a fence fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(d) A masonry wall shall have adequate weep holes in the lowest course as required by the Code to allow seepage to pass through the wall. If a masonry retaining wall fails to meet the standards of this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

§304.32. Performance Standards for Yard Grading.

(a) Yards shall have grades and swales that provide for proper drainage away from the home in accordance with the Code or other governmental regulations.

(1) If the grades or swales fail to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(2) The homeowner shall maintain the drainage pattern and protect the grading contours from erosion, blockage, over-saturation or any other changes.

(b) Settling or sinking of soil shall not interfere with the drainage patterns of the lot or have a vertical depth of six inches or more. If the soil fails to meet the standard stated in this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

§304.33. Performance Standards for Pest Control.

Eave returns, truss blocks, attic vents and roof vent openings shall not allow rodents, birds, and other similar pests into home or attic space. If an eave return, truss block, attic vent or roof vent opening that allows rodents, birds, and other similar pests into home or attic space, the builder shall take such action as is necessary to bring the variance within the standard state in this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Susan Durso
General Counsel
Texas Residential Construction Commission
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For further information, please call: (512) 475-0595

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SUBCHAPTER C. PERFORMANCE STANDARDS FOR PLUMBING, ELECTRICAL, HEATING AND AIR-CONDITIONING DELIVERY SYSTEMS SUBJECT TO A MINIMUM WARRANTY PERIOD OF TWO YEARS

10 TAC §§304.50 - 304.52

Cross Reference to Statutes: Title 16, Property Code ch. 426 and §§408.001 and 430.001

No other statutes, articles, or codes are affected by the adoption.

§304.50. Performance Standards for Electrical Delivery Systems.

(a) Performance Standards for Electrical Wiring.

(1) Electrical wiring installed inside the home shall be installed in accordance with the Code and any other applicable electrical standards and shall function properly from the point of demarcation, as determined by the respective utility.

(A) If electrical wiring inside the home is not functioning properly or is not installed in accordance with the Code and any other applicable electrical standards, the builder shall take such action as is necessary to bring the wiring to the standard of performance required in paragraph (1) of this subsection.

(B) The builder shall not be responsible for utility improvements from the meter/demarcation point to the utility poles or the transformer.

(2) Electrical wiring shall be capable of carrying the designated load as set forth in the Code.

(A) If the electrical wiring fails to carry design load, the builder shall take such action as is necessary to bring the variance within the standard set forth in paragraph (2) of this subsection.

(B) All electrical equipment shall be used for the purposes and/or capacities for which it was designed and in accordance with manufacturer's specifications.

(b) Performance Standards for the Electrical Panel, Breakers and Fuses.

(1) The electrical panel and breakers shall have sufficient capacity to provide electrical service to the home during normal residential usage.

(A) If the electrical panel or breakers do not have sufficient capacity to provide electrical service to the home during normal residential usage, the builder shall take such action as is necessary to bring the variance within the standard set forth in paragraph (1) of this subsection.

(B) The builder is not responsible for electrical service interruptions caused by external conditions such as power surges, circuit overloads and electrical shorts.

(2) The electrical panel and breakers shall have sufficient capacity to provide electrical service to the home during normal residential usage such that a circuit breaker shall not trip and fuses shall not blow repeatedly under normal residential electric usage.

(A) If a circuit breaker repeatedly trips or fuses repeatedly blow under normal residential electric usage, the builder shall take such action as is necessary to bring the variance within the standard set forth in paragraph (2) of this subsection.

(B) The builder is not responsible for circuit breaker trips or blown fuses that have functioned as designed to protect the home from external conditions such as power surges, circuit overloads and shorts.

(c) Performance Standards for Electric Outlets with Ground Fault Interrupters.

(1) Electrical outlets with ground fault interrupters shall be installed and operate in accordance with the Code and manufacturer's specifications. If ground fault interrupters trip repeatedly under normal residential usage, the builder shall take such action as is necessary to ensure that the electrical outlets with ground fault interrupters are installed in accordance with the Code and manufacturer's instructions and specifications and that they operate properly during normal residential electrical usage.

(2) The homeowner shall not plug appliances that require constant electrical flow, such as refrigerators and freezers, into an outlet with a ground fault interrupter.

(d) Performance Standards for Fixtures, Outlets, Doorbells and Switches.

(1) An outlet, doorbell or switch shall be installed in accordance with the manufacturer's specifications and the Code and shall operate properly when installed in accordance with the manufacturer's specifications and the Code. If an outlet, doorbell or switch is not installed in accordance with the manufacturer's specifications and the Code or does not operate properly when so installed, the builder shall take such action as is necessary to bring the variance within the standard stated in this subsection.

(2) A fixture, electrical box or trim plate shall be installed in accordance with the Code and manufacturer's specifications and shall be properly secured to the supporting surface. If a fixture, electrical box or trim plate is not installed in accordance with the Code and manufacturer's specifications or is not properly secured to the supporting surface, builder shall take such action as is necessary to bring the variance within the standard state in this subsection.

(3) A light shall not dim, flicker or burn out repeatedly under normal circumstances. A lighting circuit shall meet the Code. If a light or a lighting circuit fails to meet the standards stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(e) Performance Standards for Wiring or Outlets for Cable Television, Telephone, Ethernet or Other Services.

(1) Wiring or outlets for cable television, telephone, ethernet or other services shall be installed in accordance with the Code and any applicable manufacturer's specifications.

(A) If wiring or outlets for cable television, telephone, ethernet or other services are not installed in accordance with the Code or any applicable manufacturer's specifications, the builder shall take such action as is necessary to bring the variance within the standard set forth in paragraph (1) of this subsection.

(B) A builder is not responsible for the failure of wiring or other utility service connectors or conduits that begin before the point at which the service enters the home.

(2) Wiring or outlets for cable television, telephone, ethernet or other services inside the home or on the home side of the meter/demarcation point shall function properly when installed in accordance with the performance standard in paragraph (1) of this subsection.

(A) If wiring or outlets for cable television, telephone, ethernet or other services are not functioning, the builder shall take such action as is necessary to bring the variance within the standard set forth in paragraph (2) of this subsection.

(B) A builder is not responsible for the failure of wiring or other utility service connectors or conduits that begin before the point at which the service enters the home.

§304.51. Performance Standards for Plumbing Delivery Systems.

(a) Performance Standards for Pipes including Water and Gas Pipes, Sewer and Drain Lines, Fittings and Valves but not including pipes included in a Landscape Irrigation System.

(1) Pipes shall be installed and insulated in accordance with the Code and manufacturer's specifications.

(A) If a water pipe bursts, the builder shall take such action as is necessary to bring the variance within the standard stated in paragraph (1) of this subsection.

(B) The homeowner is responsible for insulating and protecting exterior pipes and hose bibs from freezing weather and for maintaining a reasonable temperature in the home during periods of extremely cold weather. The homeowner is responsible for maintaining a reasonable internal temperature in a home regardless of whether the home is occupied or unoccupied and for periodically checking to ensure that a reasonable internal temperature is maintained.

(2) A water pipe shall not leak.

(A) If a water pipe is leaking, the builder shall take such action as is necessary to bring the variance within the performance standard stated in paragraph (2) of this subsection.

(B) The homeowner shall shut off water supply immediately if such is required to prevent further damage to the home.

(3) A gas pipe shall not leak, including natural gas, propane or butane gas.

(A) If a gas pipe is leaking, a builder shall take such action as is necessary to bring the variance within the standard stated in paragraph (3) of this subsection.

(B) If a gas pipe is leaking, the homeowner shall shut off the source of the gas if the homeowner can do so safely.

(4) Water pressure shall not exceed 80 pounds per square inch in any part of the water supply system located inside the home. Minimum static pressure at the building entrance for either public or private water service shall be 40 pounds per square inch in any part of the water supply system.

(A) This standard assumes the public or community water supply reaches the home side of the meter at 40 pounds per square inch. The builder is not responsible for water pressure variations originating from the water supply source.

(B) If the water pressure is excessively high, the builder shall take such action as is necessary to bring the variance within the standard stated in paragraph (4) of this subsection.

(5) A sewer, drain, or waste pipe shall not become clogged or stopped up due to construction activities.

(A) The builder shall take such action as is necessary to unclog a sewer, drain or waste pipe that is clogged or stopped up due to construction activities.

(B) The homeowner shall shut off water supply immediately if such is required to prevent damage to the home.

(b) Performance Standards for Individual Wastewater Treatment Systems. A wastewater treatment system should be capable of properly handling normal flow of household effluent in accordance with the Texas Commission on Environmental Quality requirements.

(1) The builder shall take such action as is necessary for the wastewater treatment system to perform within the standard stated in this subsection.

(2) The builder is not responsible for:

(A) system malfunctions or damage due to the addition of a fixture, equipment, appliance or other source of waste or water into the septic system by a person other than the builder or a person working at the builder's direction; or

(B) malfunctions or limitations in the operation of the system attributed to a design restriction imposed by state, county or local governing agencies; or

(C) malfunctions caused by freezing, soil saturation, soil conditions, changes in ground water table or any other acts of nature.

§304.52. Performance Standards for Heating, Air Conditioning and Ventilation Delivery Systems.

(a) A refrigerant line shall not leak.

(1) If a refrigerant line leaks, the builder shall take such action as is necessary to bring the variance within the standard stated in subsection (a) of this section.

(2) Condensation on a refrigerant line is not a leak.

(b) Performance Standards for Heating and Cooling Functions.

(1) A heating system shall produce an inside temperature of at least 68-degrees Fahrenheit as measured two feet from the outside wall of a room at a height of three feet above the floor under local outdoor winter design conditions as specified in the Code.

(A) If a heating system fails to perform to the standard stated in paragraph (1) of this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(B) Temperatures may vary up to 4-degrees Fahrenheit between rooms but no less than the standard set forth above in paragraph (1) of this subsection. The homeowner's changes made to the size or configuration of the home, the heating system or the ductwork shall negate the builder's responsibility to take measures to meet this performance standard.

(2) An air-conditioner system shall produce an inside temperature of at most 78-degrees Fahrenheit as measured in the center of a room at height of five feet above the floor, under local outdoor summer design conditions as specified in the Code.

(A) If the air-conditioner system fails to perform to the standard stated in paragraph (2) of this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(B) This standard does not apply to evaporative or other alternative cooling systems or if the homeowner makes changes to the size or configuration of the home, the air-conditioning system or the ductwork. Internal temperatures may vary up to 4-degrees Fahrenheit between rooms but no more than the standard set forth above in paragraph (2) of this subsection.

(3) A thermostat reading shall not differ by more than 4-degrees Fahrenheit from the actual room temperature taken at a height of five feet above the floor in the center of the room where the thermostat is located. The stated performance standard is related to the accuracy of the thermostat and not to the performance standard of the room temperature. If the thermostat reading differs more than 4-degrees Fahrenheit from the actual room temperature taken at a height of five feet above the floor in the center of the room where the thermostat is located, the builder shall take such action as is necessary to bring the variance within the standard.

(4) Heating and cooling equipment shall be installed and secured according to the manufacturer's instructions and specification and shall not move excessively. If the heating or cooling equipment is not installed and secured in accordance with manufacturer's instructions and specifications or moves excessively, the builder shall take such action as is necessary to properly install and secure the equipment.

(c) Performance Standards for Vents, Grills or Registers.

(1) A vent, grill or register shall operate easily and smoothly when applying normal operating pressure. If a vent, grill or register does not operate easily and smoothly when applying normal pressure when adjusting, the builder shall repair the vent, grill or register so that it operates with ease of use when applying normal operating pressure.

(2) A vent, grill or register shall be installed in accordance with the Code and manufacturer's instructions and specifications and shall be secured to the underlying surface. If a vent, grill or register is not installed and secured in accordance with the performance standard in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(d) Performance Standards for Ductwork.

(1) Ductwork shall be insulated in unconditioned areas according to Code. If ductwork is not insulated in unconditioned areas in accordance with the Code, the builder shall take such action as is necessary to bring the variance within the standard stated in this paragraph.

(2) Ductwork shall be secured according to the manufacturer's instructions and specifications and it shall not move excessively. If the ductwork is not secured according to the manufacturer's instructions and specifications or moves excessively, the builder shall take such action as is necessary to bring the variance within the standard stated in this paragraph.

(3) Ductwork shall be sealed and shall not separate or leak in excess of the standards set by the Code. If the ductwork is not sealed, is separated or leaks in excess of the standards set by the Code, the builder shall take such action as is necessary to bring the variance within the standard stated in this paragraph.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Susan Durso
General Counsel
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SUBCHAPTER D. PERFORMANCE STANDARDS FOR FOUNDATIONS AND MAJOR STRUCTURAL COMPONENTS OF A HOME SUBJECT TO A MINIMUM WARRANTY PERIOD OF TEN YEARS

10 TAC §304.100

Cross Reference to Statutes: Title 16, Property Code ch. 426 and §§408.001 and 430.001

No other statutes, articles, or codes are affected by the adoption.

§304.100. Performance Standards for Major Structural Components.

(a) Performance Standards for Slab Foundations.

(1) Slab foundations should not move differentially after they are constructed, such that a tilt or deflection in the slab in excess of the standards defined below arises from post-construction movement. The protocol and standards for evaluating slab foundations shall follow the "Guidelines for the Evaluation and Repair of Residential Foundations" as published by the Texas Section of the American Society of Civil Engineers (2002), hereinafter referred to as the "ASCE Guidelines" with the following modifications:

(A) Overall deflection from the original construction elevations shall be no greater than the overall length over which the deflection occurs divided by 360 (L/360) and must not have more than one associated symptom of distress, as described in Section 5 of the ASCE Guidelines, that results in actual observable physical damage to the home.

(B) The slab shall not deflect after construction in a tilting mode in excess of one percent from the original construction elevations resulting in actual observable physical damage to the components of the home.

(2) If measurements and associated symptoms of distress show that a slab foundation does not meet the deflection or tilt standards stated in paragraph (1) of this subsection, a third-party inspector's recommendation shall be based on the appropriate remedial measures as described in Section 7 of the ASCE Guidelines.

(b) Performance Standards for Major Structural Components of a Home other than Slab Foundations.

(1) Floor over pier and beam foundations.

(A) A floor over pier and beam foundation shall not deflect more than L/360 from its original construction elevations and have that movement create actual observable physical damage to the components of the home identifiable in Section 5.3 of the ASCE Guidelines.

(B) If a floor over pier and beam foundation deflects more than L/360 from its original construction elevation and the movement has created actual observable physical damage to the components of a home identifiable in Section 5.3 of the ASCE Guidelines, a third-party inspector's recommendation shall be based on applicable remedial measures as described in Section 7 of the ASCE Guidelines.

(2) Structural components.

(A) A defined structural component shall not crack, bow, become distorted or deteriorate, such that it compromises the structural integrity of a home or the performance of a structural system of the home resulting in actual observable physical damage to a component of the home.

(B) If a structural component of a home cracks, bows, is distorted or deteriorates such that it results in actual observable physical damage to a component of the home, the builder shall take such action as is necessary to repair, reinforce or replace such structural component to restore the structural integrity of the home or the performance of the affected structural system.

(3) Deflected structural components.

(A) A structural component shall not deflect more than the ratios allowed by the Code.

(B) If a structural component of the home is deflected more than the ratios allowed by the Code, the builder shall to repair, reinforce or replace such structural component to restore the structural integrity of the home or the performance of the affected structural system.

(4) Damaged structural components.

(A) A structural component shall not be so damaged that it compromises the structural integrity or performance of the affected structural system.

(B) If a structural component is so damaged that it compromises the structural integrity or performance of a structural system of the home, the builder shall take such action as is necessary to repair, reinforce or replace such structural component to restore the structural integrity of the home or the performance of the affected structural system.

(5) Separated structural components.

(A) A structural component shall not separate from a supporting member more than 3/4 of an inch or such that it compromises the structural integrity or performance of the system.

(B) If a structural component is separated from a supporting member more than 3/4 of an inch or separated such that it compromises the structural integrity or performance of a structural system of the home, the builder shall take such action as necessary to repair, reinforce or replace such structural component to re-establish the connection between the structural component and the supporting member, to restore the structural integrity of the home and the performance of the affected structural system.

(6) Non-performing structural components.

(A) A structural component shall function as required by the Code.

(B) If a structural component does not function as required by the Code, the builder shall take such action as is necessary to bring the variance within the standard stated in subparagraph (A) of this paragraph.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 13. CULTURAL RESOURCES

PART 1. TEXAS STATE LIBRARY AND ARCHIVES COMMISSION

CHAPTER 8. TEXSHARE LIBRARY CONSORTIUM

13 TAC §8.3, §8.5

The Texas State Library and Archives Commission adopts the amendments to 13 TAC §8.3 and §8.5, regarding the TexShare Library Consortium, with changes to the proposed text as published in the September 10, 2004, issue of the *Texas Register* (29 TexReg 8739).

The revisions restrict a single academic institution to a single TexShare membership, eliminating multiple library memberships from the same institution. The revisions clarify that TexShare member libraries may not enter into agreements that would have the effect of providing TexShare services to entities that do not qualify for membership in the consortium.

One comment was received during the comment period, related to §8.5, "...consortium members may not provide systematic access to consortium services to persons other than those constituting their primary user communities." This portion of the rule may be construed to mean that public libraries may not provide TexShare services to persons living outside the library's service areas and paying nonresident fees to use library services. This would be counter to efforts to extend library services to Texans residing in areas not served by a public library. The wording of the amended rule has been rephrased to "...consortium members may not provide systematic access to consortium services to non-member entities."

The amendments are adopted under Government Code §441.225(b), which authorizes the commission to adopt rules to govern the operation of the consortium.

The amended sections affect Government Code, §§441.221 - 441.230.

§8.3. Membership.

(a) Eligibility. Membership in the consortium is open to all institutions of higher education as determined by the Texas Higher Education Coordinating Board, and realized through the libraries that serve those institutions, to libraries of clinical medicine, and to all public libraries that are members of the state library system, as defined in Government Code, §441.127.

(b) Agreement. Public libraries will be TexShare Members so long as they remain members of the state library system. Institutions of higher education and libraries of clinical medicine must file a membership agreement, signed by a duly authorized administrative official, on joining the consortium. Participation in specific programs of the consortium may require additional agreements and fees.

(c) Annual Report. Libraries of member institutions of higher education and member libraries of clinical medicine shall file a current and complete annual report for the preceding year with the commission by January 15 of each year. Public libraries shall file their state library system reports as required by §1.85 of this title.

(d) Multiple Libraries. For institutions of higher education, the unit of membership in the TexShare Library Consortium shall be the institution. Institutions of higher education, as determined by the Texas Higher Education Coordinating Board, with libraries in multiple locations shall apply as a single unit. Community colleges shall apply per their certification by the Texas Higher Education Coordinating Board, in accordance with Government Code §61.063. Public libraries with branches shall apply as a single unit. For libraries of clinical medicine, the unit of membership shall be the non-profit corporation; those having multiple locations shall apply as a single unit. The various locations served by a non-profit corporation must be fully governed and owned by that non-profit corporation in order to qualify under the non-profit corporation's membership. Non-profit corporations that amalgamate other, independently-administered organizations that are not fully governed and owned by that nonprofit corporation must submit a separate membership application for each independent organization regardless of any pooled or central funding.

(e) Suspension of membership.

(1) Institutions of higher education and libraries of clinical medicine: Membership will be automatically renewed for each state fiscal year, provided that the library of clinical medicine or institution of higher education continues to meet the definition required in subsection (a) of this section; and an annual report has been filed as required by subsection (c) of this section.

(2) Public libraries: Public libraries shall remain TexShare members so long as they remain members of the state library system.

(3) Institutions of higher education, libraries of clinical medicine, and public libraries that no longer meet the definition in subsection (a) of this section, or are otherwise not qualified, will be suspended from membership. They may re-join TexShare when they meet the definition in subsection (a) of this section.

(f) Members may receive services or be assessed fees based on demographic, financial, or other information, as reflected in the latest statistics from the National Center for Educational Statistics, the Texas Higher Education Coordinating Board, and the Independent Colleges and Universities of Texas or from the most current statistical data reported to the commission in the Texas academic library survey and the Texas public library annual report (filed as required by subsection (c) of this section.)

(g) Fees. Some consortium services are supported by fees paid by participants. Fees will be set by the Director and Librarian for different categories of consortium services, in consideration of the costs involved in providing these services to member libraries. Complaints regarding fee assessments will be processed in accordance with procedures outlined in §2.55 of this title.

§8.5. Programs.

(a) The programs of the consortium shall include activities designed to facilitate library resource sharing. Such activities may include:

(1) providing electronic networks, shared databases, reciprocal borrowing, delivery services, and other infrastructure necessary to enable the libraries in the consortium to share resources;

(2) negotiating and executing statewide contracts for information products and services;

(3) coordinating library planning, research and development; or

(4) training library personnel.

(b) Programs of the consortium are established and administered for the benefit of consortium members. Consortium members may sometimes enter into formal or informal agreements with non-member entities. Under these agreements, consortium members may not provide systematic access to consortium services to non-member entities. This provision should not be construed in such a way as to limit a member institution's ability to provide on-site access to TexShare databases to members of the public.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Edward Seidenberg
Assistant State Librarian
Texas State Library and Archives Commission
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For further information, please call: (512) 463-5459

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PART 3. TEXAS COMMISSION ON THE ARTS

CHAPTER 35. A GUIDE TO OPERATIONS, PROGRAMS AND SERVICES

The Texas Commission on the Arts adopts the repeal and replacement of §35.2, concerning A Guide to Programs and Services, without changes to the proposed text as published in the November 12, 2004, issue of the *Texas Register* (29 TexReg 10335) and will not be republished.

Elsewhere in this issue of the *Texas Register*, the Texas Commission on the Arts contemporaneously withdraws the repeal and replacement of §35.2 on an emergency basis.

The purpose of the repeal and replacement is to be consistent with changes to programs and services of the commission as outlined in the Texas Arts Plan as amended September 2004.

No comments were received regarding adoption of the rules.

13 TAC §35.2

The repeal is adopted under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 31, 2005.

TRD-200500439
Ricardo Hernandez
Executive Director
Texas Commission on the Arts
Effective date: February 20, 2005
Proposal publication date: November 12, 2004
For further information, please call: (512) 936-6564

♦ ♦ ♦

13 TAC §35.2

The new section is adopted under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 31, 2005.

TRD-200500440
Ricardo Hernandez
Executive Director
Texas Commission on the Arts
Effective date: February 20, 2005
Proposal publication date: November 12, 2004
For further information, please call: (512) 936-6564

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TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 1. AGENCY ADMINISTRATION
SUBCHAPTER B. DISPUTE RESOLUTION

19 TAC §1.31

The Texas Higher Education Coordinating Board adopts the repeal of §1.31 concerning Alternative Dispute Resolution (ADR) Coordinator without changes as published in the August 6, 2004, issue of the Texas Register (29 TexReg 7616). Specifically, this repeal will eliminate a rule that was inadvertently duplicated in another section of the chapter.

There were no comments received concerning this repeal.

The repeal of this section is adopted under the Texas Government Code, Chapter 2009 which provides the Coordinating Board with the authority to adopt rules concerning alternative dispute resolution.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 28, 2005.

TRD-200500396
Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
Effective date: February 17, 2005
Proposal publication date: August 6, 2004
For further information, please call: (512) 427-6114

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PART 2. TEXAS EDUCATION AGENCY

CHAPTER 89. ADAPTATIONS FOR SPECIAL POPULATIONS

SUBCHAPTER BB. COMMISSIONER'S RULES CONCERNING STATE PLAN FOR EDUCATING LIMITED ENGLISH PROFICIENT STUDENTS

19 TAC §89.1250

The Texas Education Agency (TEA) adopts an amendment to §89.1250, concerning educating limited English proficient students. The amendment is adopted without changes to the proposed text as published in the October 22, 2004, issue of the *Texas Register* (29 TexReg 9785) and will not be republished. The section addresses required summer school programs for children of limited English proficiency. The adopted amendment provides summer school program funding source clarification.

Through 19 TAC §89.1250 the commissioner exercises rulemaking authority relating to summer school programs for children of limited English proficiency. The rule, adopted to be effective September 1, 1996, and last amended to be effective April 18, 2002, specifies the purpose of summer school programs; delineates provisions relating to establishment of and eligibility for the program; and describes criteria for operations, funding, and records. The General Appropriations Act, Rider 16, 78th Texas Legislature, 2003, appropriated summer school for children with limited English proficiency out of federal funds rather than the Foundation School Program. The adopted amendment to 19 TAC §89.1250 clarifies language directing district use of federal funds for required summer school programs. Language is revised in paragraph (4) to delineate appropriate funding options for districts pertaining to the use of federal funds.

Following is a summary of public comments received regarding the proposed amendment to 19 TAC §89.1250 and corresponding agency responses. The comments posed several procedural inquiries. None of the inquiries necessitated any modifications to the proposal.

Comment. The director of bilingual/English as a second language (ESL)/family literacy education of the Deer Park Independent School District (ISD) inquired whether the limited English proficient (LEP) Summer School Program involves prekindergarten and kindergarten students or other grade levels.

Agency response. The LEP Summer School Program serves limited English proficient students eligible for admission to kindergarten or first grade at the beginning of the next school year. This procedural inquiry necessitates no modifications to the proposal.

Comment. The director of bilingual/ESL instruction of the Arlington ISD asked if the state will be providing state and federal funds to districts for operating the required summer school.

Agency response. Available funds appropriated by the legislature for the support of summer school programs shall be allocated to school districts in accordance with 19 TAC §89.1250(4)(A). This procedural inquiry necessitates no modifications to the proposal.

Comment. The Arlington ISD bilingual/ESL instruction director asked if the funding will be sufficient to cover teacher salaries, e.g., a minimum of $2,500 per unit. The director commented that typically each teacher is paid $20 - $25 per hour for summer school.

Agency response. Funding for the summer school program shall be on a unit basis in such an allocation system to ensure a pupil to teacher ratio of not more than 18:1. The number of students required to earn units shall be established by the commissioner of education. The allotment per unit shall be determined by the commissioner based on funds available. This procedural inquiry necessitates no modifications to the proposal.

Comment. The Arlington ISD bilingual/ESL instruction director inquired whether districts can purchase supplemental materials with federal funds.

Agency response. Districts may use funds, consistent with requirements for the expenditure of federal funds, to cover the cost of supplemental materials.

The amendment is adopted under the Texas Education Code, §29.056, which authorizes the agency to adopt rules relating to the identification, assessment, and classification of students of limited English proficiency eligible for entry into the program or exit from the program. Texas Education Code, §29.060, establishes preschool, summer school, and extended time programs for bilingual and special language programs.

The amendment implements the Texas Education Code, §§29.051, 29.053, 29.056, and 29.060 and the General Appropriations Act, Rider 16, 78th Texas Legislature, Regular Session, 2003.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 28, 2005.

TRD-200500381
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Effective date: February 17, 2005
Proposal publication date: October 22, 2004
For further information, please call: (512) 475-1497

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CHAPTER 101. ASSESSMENT

SUBCHAPTER AA. COMMISSIONER'S RULES CONCERNING THE PARTICIPATION OF LIMITED ENGLISH PROFICIENT STUDENTS IN STATE ASSESSMENTS

The Texas Education Agency (TEA) adopts amendments to §§101.1001, 101.1005, 101.1007, and 101.1009 and the repeal of §101.1011, concerning assessment. The amendments to §§101.1001, 101.1005, and 101.1009 and the repeal of §101.1011 are adopted without changes to the proposed text as published in the October 22, 2004, issue of the *Texas Register* (29 TexReg 9786) and will not be republished. The amendment to §101.1007 is adopted with changes to the proposed text. The sections address the participation of limited English proficient (LEP) students in state assessments. The adopted amendments and repeal are necessary to comply with federal legislation regarding LEP students and to provide clarification in the rules.

Commissioner's rules in 19 TAC Chapter 101, Subchapter AA, concerning the participation of LEP students in state assessments were adopted to be effective September 2001.

State legislation passed in 1995 required the commissioner of education to develop a way to evaluate the progress of LEP students who were eligible for exemption from the state-mandated assessments. This provided the impetus for the development of the Reading Proficiency Tests in English (RPTE). After seeking input from national experts and state stakeholders, the commissioner developed the RPTE, a test that would measure the progress LEP students make annually in learning to read in English.

The RPTE enables Texas schools to evaluate whether LEP students are making steady annual progress in English development during the time they qualify for an exemption from the state academic content area assessments. RPTE has been designed carefully to help educators understand more clearly what LEP students can and cannot comprehend at various stages of learning English. Educators who understand these stages of development are better able to help English learners progress from one stage of English development to the next. Educators are also able to use this information to adapt the academic instruction of the student to make it comprehensible. RPTE is currently administered to LEP students in Grades 3 - 12.

The No Child Left Behind Act of 2001 (NCLB) requires states to conduct annual statewide English language proficiency assessments in the domains of listening, speaking, reading, and writing to show the progress that limited English proficient students in kindergarten through Grade 12 make in learning the English language.

The following adopted amendments to 19 TAC Chapter 101, Subchapter AA, are necessary to comply with federal legislation and to provide clarification of state provisions.

Section 101.1001, Reading Proficiency Tests in English, is retitled English Language Proficiency Assessments and amended to reflect the federal requirements of NCLB for assessing the English language proficiency of students in additional domains and grades. No changes were made to this section since published as proposed.

Section 101.1005, Limited English Proficient Students at the Exit Level, is amended to remove the reference to end-of-course tests. No changes were made to this section since published as proposed.

Section 101.1007, Limited English Proficient Students at Grades Other Than the Exit Level, is amended to clarify exemptions for immigrant LEP students and exemption eligibility. A new subsection (c) is added to provide that the test administration materials will delineate the circumstances under which a student who exempted from the state academic skills assessments under §101.1007(b) will be assessed through alternative means in subjects and grades required by federal law or regulations. In response to public comment, the following changes were made to this section since published as proposed. Language was added in subsection (c) to clarify that exempt students who are assessed solely for federal accountability purposes will not be subject to the grade advancement requirements under the Student Success Initiative. Subsection (b) was modified to change the word adequate to inadequate to correct a typographical error.

Section 101.1009, Limited English Proficient Students Who Receive Special Education Services, is amended to update references to related TAC provisions. No changes were made to this section since published as proposed.

Section 101.1011, Clarification of Provisions, is repealed. It is no longer necessary because there are no inconsistencies between this section of the TAC and the provisions found in 19 TAC Chapter 89, Subchapter BB. No changes were made to this repeal since published as proposed.

Following is a summary of public comments received on the proposed amendments to 19 TAC Chapter 101, Subchapter AA, and corresponding agency responses.

Comment. The district test coordinator from Brownsville Independent School District (ISD) suggested that language be added to proposed §101.1007(c) to clarify that exempt students assessed solely for federal accountability purposes are not subject to the grade advancement requirements of the Student Success Initiative.

Agency response. The agency agrees and has added language to the section accordingly.

Comment. A representative from Texas City ISD identified a typographical error in §101.1007(b). The word adequate was used, when the intended word was inadequate.

Agency response. The agency agrees and has modified the section accordingly.

19 TAC §§101.1001, 101.1005, 101.1007, 101.1009

The amendments are adopted under the Texas Education Code (TEC), §39.023, which authorizes the commissioner of education to adopt rules concerning the exemption of limited English proficient students from the administration of assessment instruments.

The amendments implement the Texas Education Code, §39.023.

§101.1007. Limited English Proficient Students at Grades Other Than the Exit Level.

(a) In Grades 3 - 6, the language proficiency assessment committee (LPAC) shall determine whether a limited English proficient (LEP) student is administered the assessment of academic skills in English or in Spanish. A LEP student may be administered a Spanish version of the assessment of academic skills for a maximum of three years.

If the LEP student is an immigrant, the number of LEP exemptions and administrations of the assessment in Spanish must not exceed three.

(b) In accordance with paragraphs (1) - (4) of this subsection, certain immigrant LEP students who have had inadequate schooling outside the U.S. may be eligible for an exemption from the assessment of academic skills during a period not to exceed their first three school years of enrollment in U.S. schools. The term "immigrant" in this subchapter is defined as a student who has resided outside the 50 U.S. states for at least two consecutive years.

(1) An immigrant LEP student who achieves a rating of advanced high on the state-administered reading proficiency tests in English during the student's first school year of enrollment in U.S. schools is not eligible for an exemption in the second or third school year of enrollment in U.S. schools. An immigrant LEP student who achieves a rating of advanced or advanced high on this assessment during the student's second school year of enrollment in U.S. schools is not eligible for an exemption in the third school year of enrollment in U.S. schools.

(2) During the first school year of enrollment in U.S. schools, the immigrant student may be granted a LEP exemption if the LPAC determines that the student has not had the schooling outside the U.S. necessary to provide the foundation of learning that Texas schools require and measure on the assessment, whether the foundation be in knowledge of the English language or specific academic skills and concepts in the subjects assessed.

(3) During the second and third school year of enrollment in U.S. schools, the immigrant student whose schooling outside the U.S. was inadequate and for whom a primary language assessment is not available may be granted a LEP exemption if the LPAC determines that the student lacks the academic language proficiency in English necessary for an assessment of academic skills in English to measure the student's academic progress in a valid, reliable manner.

(4) During the second and third school year of enrollment in U.S. schools, the immigrant student whose schooling outside the U.S. was inadequate and for whom a Spanish-version assessment is available is not eligible for a LEP exemption and must take the assessment in either English or Spanish unless:

(A) the student is in an English as a second language (ESL) program, which does not call for instruction in Spanish, and the LPAC determines that the student lacks the language proficiency in English and the academic instruction in Spanish and/or literacy in Spanish for the assessment in either English or Spanish to measure the student's academic progress in a valid, reliable manner; or

(B) the student is in a bilingual education program and the LPAC has documentation, including signed verification by the parent or guardian whenever possible, that there was an extensive period of time outside the U.S. in which the student did not attend school and that this absence of schooling resulted in such limited academic achievement and/or literacy that assessment in either English or Spanish is inappropriate as a measure for school accountability. The term "extensive period of time outside the U.S.," as used in this subparagraph, shall be defined in the test administration materials.

(c) Students exempted under subsection (b) of this section shall be administered assessments in subjects and grades required by federal law and regulations as delineated in the test administration materials. Exempt students assessed only for federal accountability purposes shall not be subject to the grade advancement requirements under the Student Success Initiative.

(d) A LEP student whose parent or guardian has declined the services required by the Texas Education Code, Chapter 29, Subchapter B, is not eligible for an exemption under subsection (b) of this section. The student shall take the assessments of academic skills in English and the English language proficiency assessments required by §101.1001 of this title (relating to English Language Proficiency Assessments).

(e) School districts may administer the assessment of academic skills in Spanish to a student who is not identified as limited English proficient but who participates in a two-way bilingual program if the LPAC determines the assessment in Spanish to be the most appropriate measure of the student's academic progress. However, the student may not be administered the Spanish-version assessment for longer than three years.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 28, 2005.

TRD-200500382
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Effective date: February 17, 2005
Proposal publication date: October 22, 2004
For further information, please call: (512) 475-1497

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19 TAC §101.1011

The repeal is adopted under the Texas Education Code (TEC), §39.023, which authorizes the commissioner of education to adopt rules concerning the exemption of limited English proficient students from the administration of assessment instruments.

The repeal implements the Texas Education Code, §39.023.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 28, 2005.

TRD-200500383
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Effective date: February 17, 2005
Proposal publication date: October 22, 2004
For further information, please call: (512) 475-1497

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SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING IMPLEMENTATION OF TESTING PROGRAM

The Texas Education Agency (TEA) adopts an amendment to §101.3001, and the repeal of and new §101.3003, concerning assessment. The amendment, repeal, and new section are adopted without changes to the proposed text as published in the October 22, 2004, issue of the *Texas Register* (29 TexReg 9792) and will not be republished. The sections address the

implementation of the testing program. The adopted amendment, repeal, and new section clarify transitional issues related to the Texas Assessment of Knowledge and Skills (TAKS), as specified by the 76th Texas Legislature, 1999, and establish rules for the implementation of the Grade 8 science test required by the 78th Texas Legislature, 2003.

Senate Bill (SB) 103, 76th Texas Legislature, 1999, mandated a new testing program of increased rigor, size, and scope. Planning for this new program, the TAKS, began in the fall of 1999, and it was fully implemented during the 2002 - 2003 school year. A series of rule actions have occurred to implement the new testing program since its enactment by the Texas Legislature in 1999.

The repeal of and new 19 TAC Chapter 101, Assessment, was subsequently adopted by the State Board of Education (SBOE) at its September 2001 meeting, with an effective date of November 15, 2001. The new SBOE rules set forth in 19 TAC Chapter 101, Subchapters A - E, include provisions relating to eligibility to receive a high school diploma. Beginning with the 2003 - 2004 school year, students who were enrolled in Grade 8 or a lower grade on January 1, 2001, must fulfill testing requirements for graduation with the Grade 11 exit level TAKS test.

Following this major rewriting of the SBOE assessment rules, an Attorney General's opinion was requested to clarify the respective roles and responsibilities of the SBOE and the agency as related to the statewide assessment program, authorized by TEC, Chapter 39, Subchapter B. In his March 12, 2002, letter in response to this request, then Attorney General John Cornyn also confirmed certain rulemaking authority of the commissioner of education for implementing the new testing program, as set forth in Section 9 of SB 103, 76th Texas Legislature, 1999.

TEC, §39.023, requires the commissioner to adopt rules for implementing the new testing program established by the SBOE in 19 TAC Chapter 101, Subchapters A - E. In accordance with SB 103, Section 9, and TEC, Chapter 39, Subchapter B, the commissioner adopted rules concerning implementation of the testing program in 19 TAC Chapter 101, Subchapter CC, to be effective February 16, 2003.

In order to clarify transitional issues regarding which cohort is required to take which exit level assessment, current 19 TAC §101.3003, Transitional Issues Related to New Assessment Program, is repealed and a new §101.3003, entitled Graduation Requirements, is added. The adopted new §101.3003 clarifies the following two situations.

First, students who are on an accelerated track and who fulfilled all graduation requirements other than passage of an exit level test before September 1, 2004, should fulfill their testing requirements for graduation with the exit level Texas Assessment of Academic Skills (TAAS) test. This applies to students regardless of whether they were enrolled in Grade 8 or a lower grade on January 1, 2001.

Secondly, all students who have already passed the Algebra I end-of-course (EOC), English II EOC, and either Biology or U.S. History EOC exams by spring 2002 have already satisfied the assessment requirement for graduation.

In addition, House Bill (HB) 411, 78th Texas Legislature, 2003, amended TEC, §39.023(a), to require that a science assessment instrument in Grade 8 be administered not later than the 2006 - 2007 school year. The legislation also requires that the results be included in evaluating the performance of school districts, campuses, and open-enrollment charter schools not later than the 2008 - 2009 school year. TEC, §39.023, requires the commissioner to adopt rules for implementing the new science assessment at Grade 8. The legislation also added §39.023(a)(7), which requires that students be assessed in any other subject and grade required by the federal government.

The adopted amendment to §101.3001, Implementation of New Assessment Instruments, adds a new subsection (b) to comply with TEC, §39.023, as amended by HB 411.

No comments were received regarding adoption of the amendment, repeal, or new section.

19 TAC §101.3001, §101.3003

The amendment and new section are adopted under the Senate Bill 103, Section 9, 76th Texas Legislature, 1999 (Acts of the 76th Texas Legislature, 1999, Chapter 397), which authorizes the commissioner of education to adopt rules for the implementation of Texas Education Code, §39.023.

The amendment and new section implement the Texas Education Code, §39.023 and §39.025 and Senate Bill 103, Section 9, 76th Texas Legislature, 1999.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 28, 2005.

TRD-200500384
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Effective date: February 17, 2005
Proposal publication date: October 22, 2004
For further information, please call: (512) 475-1497

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19 TAC §101.3003

The repeal is adopted under the Senate Bill 103, Section 9, 76th Texas Legislature, 1999 (Acts of the 76th Texas Legislature, 1999, Chapter 397), which authorizes the commissioner of education to adopt rules for the implementation of Texas Education Code, §39.023.

The repeal implements the Texas Education Code, §39.023 and §39.025 and Senate Bill 103, Section 9, 76th Texas Legislature, 1999.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 28, 2005.

TRD-200500385

Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
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Proposal publication date: October 22, 2004
For further information, please call: (512) 475-1497

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CHAPTER 102. EDUCATIONAL PROGRAMS SUBCHAPTER DD. COMMISSIONER'S RULES CONCERNING THE TEXAS ACCELERATED SCIENCE ACHIEVEMENT PROGRAM GRANT

19 TAC §102.1041

The Texas Education Agency (TEA) adopts new §102.1041, concerning educational programs. The new section is adopted with changes to the proposed text as published in the October 22, 2004, issue of the *Texas Register* (29 TexReg 9794). The new section implements the requirements of the Texas Education Code (TEC), §29.089, and the General Appropriations Act, House Bill 1, Article III, Rider 45, 78th Texas Legislature, 2003, that require the commissioner of education by rule to establish procedures and adopt guidelines for the administration of the Texas Accelerated Science Achievement Program grant.

TEC, §29.089, requires the commissioner of education to adopt rules to establish and implement intensive after-school and summer school programs designed to increase Grade 10 and 11 student achievement on the high school science portion of the Texas Assessment of Knowledge and Skills (TAKS). Appropriation authority is provided in General Appropriations Act, House Bill 1, Article III, Rider 45, 78th Texas Legislature, 2003.

New §102.1041 adopts provisions that: (1) prescribe a procedure that a school district must follow to apply for and receive funding for a program under this section; (2) establish guidelines for determining which districts receive funding if there is not sufficient funding for each district that applies; (3) require each district providing a program to report student performance results to the commissioner within the period and in the manner prescribed by rule; and (4) based on these district reports and any required analysis and verification of those reports, provide for the dissemination to each district in this state information concerning instructional methods that have proved successful in improving student performance in science.

Grantees must agree to submit all information requested by the TEA through periodic activity/progress reports and a final evaluation report. Reports will be due to the TEA no later than 30 days after the close of the reporting period, and must contain all requested information in the prescribed format. These reports will be used by the project administrator to evaluate the implementation and progress of grant-funded programs and to determine if modifications or adjustments to the program are necessary.

Following is a summary of public comments received and corresponding agency responses regarding the proposed new 19 TAC Chapter 102, Educational Programs, Subchapter DD, Commissioner's Rules Concerning the Texas Accelerated Science Achievement Program Grant, §102.1041, Texas Accelerated Science Achievement Program Grant.

Comment. The Texas Classroom Teachers Association (TCTA) requested that subsection (b)(1)(A) be modified to add language from the enabling statute (TEC, §29.089) to reflect the requirement that eligibility determinations be based upon the grade level or course in which a student must be enrolled and upon consideration of teacher recommendations.

TCTA expressed the belief that teacher recommendations in curriculum matters such as this are invaluable and the fact that the statute specifically requires consideration of teacher recommendations should be pointed out in the adopted rule. TCTA commented that the rule otherwise appears largely to track statutory language anyway, with the notable exception of the language reflected in the recommended modification.

Agency response. The agency agrees and has modified the subsection accordingly.

Comment. TCTA commented that the TEA should provide guidance to districts regarding what is meant by the statutory language, "considering teacher recommendations in determining eligibility." The TCTA noted that a good pre-existing model is language adapted from statute relating to the Texas Advanced Placement Incentive Program, TEC, §28.053.

Agency response. The agency disagrees and declines to adopt the additional, non-statutory guidance recommended by TCTA. The language recommended would be too prescriptive to include as rule. This requirement would not permit local school districts maximum flexibility in establishing procedures for providing for consideration of teacher recommendations in determining eligibility. However, the agency agrees to provide such guidance as an example in the language of the Request for Applications associated with the grant program.

The new section is adopted under the Texas Education Code, §29.089, which authorizes the commissioner of education by rule to prescribe procedures for districts to apply for funding, adopt guidelines for the administration of the Texas Accelerated Science Achievement Program grant, and establish requirements relating to the reporting of student performance results by participating districts and the dissemination of successful instructional methods to Texas schools.

The new section implements the Texas Education Code, §29.089.

§102.1041. Texas Accelerated Science Achievement Program Grant.

(a) The intent and purpose of the Texas Accelerated Science Achievement Program (Texas ASAP) is to establish and implement intensive after-school and summer school programs designed to increase Grade 10 and 11 student achievement on the science portion of the Texas Assessment of Knowledge and Skills (TAKS). Through intervention programs that will serve students in Grades 9 - 12, the Texas ASAP will target high schools with low student performance on the Grade 10 and 11 science TAKS examinations.

(b) Funds shall be distributed by the commissioner of education, on a competitive grant basis, to be used by school districts for the implementation of scientific, research-based science programs designed to improve the performance of students in science, including programs designed to address the gender gap in performance. Prior to providing a program, in accordance with the Texas Education Code, §29.089, and the General Appropriations Act, House Bill 1, Article III, Rider 45, 78th Texas Legislature, 2003, each school district receiving a grant must:

(1) document its locally-adopted board of trustees policy for:

(A) determining student eligibility for participating in the program that:

(i) prescribes the grade level or course a student must be enrolled in to be eligible; and

(ii) provides for considering teacher recommendations in determining eligibility;

(B) ensuring that parents of or persons standing in parental relation to eligible students are provided notice of the program;

(C) ensuring that eligible students are encouraged to attend the program;

(D) ensuring that the program is offered at one or more locations in the district that are easily accessible to eligible students; and

(E) measuring student progress;

(2) demonstrate a need for additional intervention as evidenced by student performance in science resulting in at least one high school identified as under performing. An under-performing campus is one with a TAKS science passing rate below the state average; and

(3) partner with a science department of an institution of higher education.

(c) The guidelines delineated in this subsection shall determine which school districts may receive funding under the Texas ASAP.

(1) School districts must submit applications in accordance with instructions provided by the Texas Education Agency (TEA). Applications received by the established deadline date and time will be reviewed. For each eligible application, the recommendations of the reviewers will be assembled and presented to the commissioner or the commissioner's designee who will:

(A) approve the application in whole or in part; or

(B) disapprove the application.

(2) Awards will be considered on the basis of total points. Grant awards will be made starting with the highest scoring application and continue to the next highest score until funds are exhausted or until the applications meeting minimum criteria or higher are funded. In the event of a tie score that would preclude determination of funding, the effected applicants will be asked to provide additional clarifying information to determine highest need or greatest capacity for successful implementation.

(3) The TEA will notify each applicant in writing of the selection or non-selection for funding. In the case of an application selected for funding, notification to the grantee will include the contractual conditions which the applicant must accept in accordance with state law.

(d) Grantees must agree to submit all information requested by the TEA through periodic activity/progress reports, a final evaluation report, and other activities related to the evaluation of the program. Reports will be due to the TEA no later than 30 days after the close of the reporting period and must contain all requested information in the prescribed format. These reports will be used by the TEA to evaluate the implementation and progress of grant-funded programs and to determine if modifications or adjustments to the program are necessary.

(e) Based on a comprehensive analysis of the periodic activity/progress reports, final evaluation reports, and other relevant data, the TEA will disseminate to each Texas school district information concerning instructional methods that have proved successful in improving student performance in science.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 28, 2005.

TRD-200500386
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Effective date: February 17, 2005
Proposal publication date: October 22, 2004
For further information, please call: (512) 475-1497

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PART 8. WINDHAM SCHOOL DISTRICT

CHAPTER 300. GENERAL PROVISIONS

19 TAC §300.1

The Windham School District Board of Trustees adopts the amendment to §300.1, concerning Public Testimony and Comments to the Windham School District Board of Trustees without changes to the text as proposed in the December 17, 2004, issue of the *Texas Register* (29 TexReg 11538).

The purpose of the amendments are to rename the rule title and clarify procedures for presenting public testimony on agenda items versus presenting public comment on topics under the jurisdiction of the Board.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Education Code, §§19.001 - 19.004, which establishes the Windham School District and the policymaking role of the Texas Board of Criminal Justice, and Texas Government Code, Chapter 551, the Open Meetings Act.

Cross Reference to Statutes: Texas Education Code, §§19.001 et seq., and Texas Government Code, Chapter 551, The Open Meetings Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 28, 2005.

TRD-200500416
Carl Reynolds
General Counsel
Windham School District
Effective date: February 17, 2005
Proposal publication date: December 17, 2004
For further information, please call: (512) 463-0422

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TITLE 22. EXAMINING BOARDS

PART 5. STATE BOARD OF DENTAL EXAMINERS

CHAPTER 100. GENERAL PROVISIONS

22 TAC §§100.1 - 100.5, 100.10, 100.20

The Texas State Board of Dental Examiners (Board) adopts new 22 TAC Chapter 100, titled "General Provisions," and containing new §§100.1 - 100.5, 100.10, and 100.20. Section 100.5 is adopted with changes to the proposed text as published in the December 10, 2004, issue of the *Texas Register* (29 TexReg 11451). Sections 100.1 - 100.4, 100.10, and 100.20 are adopted without changes and will not be republished.

The new sections provide rules governing basic operations of the Board, pursuant to the recommendation of the Texas Sunset Advisory Commission.

Section 100.1, "Introduction," defines the name, location, legal authority, composition, and fiscal year of the Board.

Section 100.2 delineates the purpose and functions of the Board, as mandated by the Dental Practice Act.

Section 100.3 describes the organization and structure of the Board, pursuant to the Dental Practice Act.

Section 100.4 describes the officers of the Board.

Section 100.5 provides guidelines and requirements for Board meetings.

Section 100.10 describes the powers and responsibilities of the executive director.

Section 100.20 discusses final board decisions in contested cases.

Several comments were received from stakeholders suggesting minor typographical and only two minimally substantive changes to §100.5: specifying the distribution of board meeting agendas to certain advisory committees; and mandating that board meeting minutes be filed with the Legislative Reference Library and the Texas State Library within 45 days of board approval of the minutes.

The new sections are adopted under Texas Government Code §§2001.021 et seq., Texas Civil Statutes; the Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The new sections affect Title 3, Subtitle D of the Occupations Code and Title 22, Texas Administrative Code, Chapter 101 - 125.

§100.5. Meetings.

(a) Frequency and location. The board shall hold meetings at least twice a year at times and places the board determines.

(b) Agenda. An agenda for each meeting shall be posted in accordance with the Open Meetings Act and copies shall be sent to each member of the board, Dental Hygiene Advisory Council, and Dental Laboratory Certification Council.

(c) Quorum. A majority of the members of the board shall constitute a quorum for the transaction of all business at any regular or special meeting.

(d) Voting. The board may act only by majority vote of its members present and voting, with each member entitled to one vote, unless a conflict of interest exists.

(e) Presiding officer. In the absence of the appointed presiding officer, the secretary shall act as presiding officer. In the absence of both the appointed presiding officer and the secretary, an acting presiding officer shall be chosen by a majority of the board members present, to preside over that meeting only.

(f) Parliamentary procedure. Board and committee meetings shall be conducted pursuant to the protocols contained in Robert's Rules of Order Newly Revised.

(g) Minutes. Minutes of all board meetings shall be prepared and supplied to board members for their review at or prior to the next subsequent board meeting, and shall be filed with the Legislative Reference Library and the Texas State Library within 45 days of board approval of the minutes.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 31, 2005.

TRD-200500423
Bobby D. Schmidt, M.Ed.
Executive Director
State Board of Dental Examiners
Effective date: February 20, 2005
Proposal publication date: December 10, 2004
For further information, please call: (512) 475-0972

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CHAPTER 101. DENTAL LICENSURE

22 TAC §101.2

The Texas State Board of Dental Examiners (Board) adopts amendments to 22 TAC Chapter 101, §101.2, concerning Dental Licensure by Examination without changes to the proposed text as published in the December 10, 2004, issue of the *Texas Register* (29 TexReg 11453) and will not be republished.

The amendments establish standards for reexamination, as required by Occupations Code §256.006. The section as amended also contains revisions to clarify and standardize language, and to improve organization.

Subsection (e) has been added to establish remediation requirements for applicants for Texas dental licensure that fail three general dentistry clinical examination attempts, and another elevated level of requirements for those that fail four or more attempts. The section as amended also requires that all programs of remediation be approved in advance by the SBDE, and that reexamination be accomplished within 18 months of the approval of a program of remediation for the applicant.

There are no other substantive changes to the section.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Government Code §§2001.021 et seq., Texas Civil Statutes; the Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The amendment affects Title 3, Subtitle D of the Occupations Code and Title 22, Texas Administrative Code, Chapter 101 - 125.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bobby D. Schmidt, M.Ed.
Executive Director
State Board of Dental Examiners
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For further information, please call: (512) 475-0972

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CHAPTER 103. DENTAL HYGIENE LICENSURE

22 TAC §103.1

The Texas State Board of Dental Examiners (Board) adopts amendments to 22 TAC Chapter 103, §103.1, concerning general qualifications for dental hygienist licensure without changes to the proposed text as published in the December 10, 2004, issue of the *Texas Register* (29 TexReg 11454) and will not be republished.

The amendments clarify and standardize language, and improve organization.

The amendment removes subsection (g), which previously addressed designated regional examining boards. 22 TAC Chapter 103, §103.2, which addresses licensure by examination, is being concurrently amended to relocate the language of this subsection.

There are no other substantive changes to the section.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Government Code §§2001.021 et seq., Texas Civil Statutes; the Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The amendment affects Title 3, Subtitle D of the Occupations Code and Title 22, Texas Administrative Code, Chapter 101 - 125.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bobby D. Schmidt, M.Ed.
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State Board of Dental Examiners
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For further information, please call: (512) 475-0972

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22 TAC §103.2

The Texas State Board of Dental Examiners (Board) adopts amendments to 22 TAC Chapter 103, §103.2, concerning dental hygienist licensure by examination without changes to the proposed text as published in the December 10, 2004, issue of the *Texas Register* (29 TexReg 11455) and will not be republished. The amendments establish standards for reexamination, as required by Occupations Code §256.006. The section as amended also contains revisions to clarify and standardize language, and to improve organization.

Subsection (b) has been added to accommodate the relocation of language concerning designated regional examining boards, that currently resides in §103.1. That language is more appropriately be located in §103.2. No changes were made to the language itself.

Subsection (c) has been added to establish remediation requirements for applicants for Texas dental hygienist licensure that fail three general dentistry clinical examination attempts, and another elevated level of requirements for those that fail four or more attempts. The section as amended also requires that all programs of remediation be approved in advance by the SBDE, and that reexamination be accomplished within 18 months of the approval of a program of remediation for the applicant.

There are no other substantive changes to the section.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Government Code §2001.021 et seq., Texas Civil Statutes; the Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The amendment affects Title 3, Subtitle D of the Occupations Code and Title 22, Texas Administrative Code, Chapter 101-125.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bobby D. Schmidt, M.Ed.
Executive Director
State Board of Dental Examiners
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For further information, please call: (512) 475-0972

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CHAPTER 108. PROFESSIONAL CONDUCT

SUBCHAPTER A. PROFESSIONAL RESPONSIBILITY

22 TAC §108.6

The Texas State Board of Dental Examiners (Board) adopts 22 TAC Chapter 108, §108.6, concerning the required reporting of dental patient death or hospitalization without changes to the proposed text as published in the December 10, 2004, issue of the *Texas Register* (29 TexReg 11458) and will not be republished. The amendments are proposed to more clearly delineate what patient hospitalizations must be reported by a dentist. The section as amended also contains revisions to clarify and standardize language, and to improve organization.

Specifically, the section as amended defines hospitalization as "an examination at a hospital or emergency medical facility that results in an in-patient admission for the purpose(s) of treatment and/or monitoring." The proposed language also allows for reporting within 30 days of such time as the dentist becomes aware or reasonably should have become aware of a qualifying hospitalization, to address instances in which the dentist has no knowledge of a patient's hospitalization.

There are no other substantive changes to the section.

No comments were received regarding the adoption of the amendment.

The amendment is adopted under Texas Government Code §2001.021 et seq., Texas Civil Statutes; the Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The amendment affects Title 3, Subtitle D of the Occupations Code and Title 22, Texas Administrative Code, Chapter 101-125.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bobby D. Schmidt, M.Ed.
Executive Director
State Board of Dental Examiners
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For further information, please call: (512) 475-0972

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PART 16. TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

CHAPTER 323. POWERS AND DUTIES OF THE BOARD

22 TAC §323.4

The Texas Board of Physical Therapy Examiners adopts the repeal of §323.4, Applications Review Committee, without changes as published in the November 26, 2004, issue of the *Texas Register* (29 TexReg 10867).

The rule is repealed because the Board has eliminated this committee, moving the task of reviewing applications that require special consideration to either the Education Committee or the Rules and Practice Committee, whichever is most appropriate for a specific application.

No comments were received regarding the repeal of this section.

The repeal is adopted under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200500417
John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
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Proposal publication date: November 26, 2004
For further information, please call: (512) 305-6900

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CHAPTER 341. LICENSE RENEWAL

22 TAC §341.2, §341.3

The Texas Board of Physical Therapy Examiners adopts amendments to §341.2, Continuing Education Requirements and §341.3, Qualifying Continuing Education. Section 341.3 is adopted with changes to the proposed text as published in the November 26, 2004, issue of the *Texas Register* (29 TexReg 10867). Section 341.2 is adopted without changes and will not be republished.

In §341.3 changes were made to the definition of Continuing Education, and included rewording the last sentence slightly to eliminate confusion over educational levels and to add punctuation to the first sentence.

The amendments update the Board's rules covering Continuing Education and add a definition of the term. The amendments also standardize terms used and the length of time records must be retained; give clearer descriptions of the types of acceptable continuing education and what standards each type must meet to satisfy board requirements; establish several new categories of CE, and change how CE credit is calculated for certain types of self-directed study.

No comments were received regarding these sections.

The amendments are adopted under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

§341.3. Qualifying Continuing Education.

(a) Continuing education for the profession of physical therapy is a structured process of education designed or intended to support

the continuous development of physical therapists and physical therapist assistants, and to maintain and enhance their professional competence. Continuing education is professional education that goes beyond their entry-level education and is applicable to the practice of physical therapy.

(b) Programs offered as continuing education (CE).

(1) One CEU is defined as ten contact hours.

(2) Program content and structure must be approved by the board-approved organization. Programs must meet the following criteria:

(A) Program content must be easily recognizable as pertinent to the physical therapy profession and in the areas of ethics, professional responsibility, clinical application, clinical management, behavioral science, science, or risk management.

(B) The content must be identified by instructional level, i.e., basic, intermediate, advanced. Program objectives must be clearly written to identify the knowledge and skills the participants should acquire and be consistent with the stated instructional level.

(C) The instructional methods related to the objectives must be identified and be consistent with the stated objectives.

(D) Programs must be presented by a licensed health care provider, or by a person with appropriate credentials and/or specialized training in the field.

(E) Program providers are prohibited from self-promotion of programs, products, and/or services during the presentation of the program.

(F) The participants must evaluate the program. A summary of these evaluations must be made available to the board-approved organization upon request.

(G) Records of each licensee who participates in the program must be maintained for four years by the CE sponsor and must be made available to the board-approved organization upon request.

(3) CE programs subject to §341.3(b) include the following:

(A) Traditional on-site CE programs.

(i) Documentation for CE programs must include the name and license number of the licensee; the title, sponsor, date(s), and location of the course; the number of CEUs awarded, the signature of an authorized signer, and the program approval number.

(ii) If selected for audit, the licensee must submit the specified documentation.

(B) Home study CE programs (hard copy or web-based).

(i) Documentation must include the name and license number of the licensee; the title, sponsor, date(s), and instructional format of the course; the number of CEUs awarded, the signature of an authorized signer, and the program approval number.

(ii) If selected for audit, the licensee must submit the specified documentation.

(C) Regular inservice-type CE programs over a one-year period where individual sessions are 2 hours or less.

(i) Documentation must include the name and license number of the licensee; the title, sponsor, date(s), and location of the inservice; the signature of an authorized signer, and the program approval number with the maximum CEUs granted and the CEU value of each session or group of sessions specified and justified.

(ii) Additionally, proof of attendance to any or all inservice sessions must be provided so that individual CEUs earned can be calculated by the program sponsor for submission to the board-approved organization.

(iii) If selected for audit, the licensee must submit the specified documentation.

(D) Large conferences with concurrent CE programming.

(i) Documentation must include the licensee's name and license number; title, sponsor, date(s); and location of the conference; the number of CE units awarded, the signature of an authorized signer, and the course approval number.

(ii) If selected for audit, the licensee must submit the specified documentation and proof of attendance.

(c) College or university courses.

(1) College or university courses easily recognizable as pertinent to the physical therapy profession and in the areas of ethics, professional responsibility, clinical application, clinical management, behavioral science, science, or risk management may be submitted by licensees for consideration of their CE requirement.

(A) Documentation required for submission includes the course syllabus for each course and an official transcript. To be considered, the course must be at the appropriate educational level for the physical therapist or physical therapist assistant.

(B) The licensee should submit the request to the board-approved organization at least 60 days prior to the license expiration date.

(2) One (1.0) CEU is credited for each satisfactorily (grade of C or higher) completed credit hour. If course contact hours are specified in the syllabus, 1.0 CEU is credited for every 10 contact hours in courses where the licensee earned a grade of C or higher.

(3) Documentation must include the approval letter from the board-approved organization. If selected for an audit, the licensee must submit the specified documentation.

(4) College or university sponsored CE programs (no grade, no official transcript) must comply with §341.3(b) of this title.

(d) Self-directed study.

(1) Publications.

(A) Publication(s) pertinent to physical therapy and in the areas of ethics, professional responsibility, clinical application, clinical management, behavioral science, science, or risk management written for the professional or lay audience published within the 24 months prior to the license expiration date may be submitted by the author(s) for consideration of their CE requirement. The author(s) are prohibited from self-promotion of programs, products, and/or services in the publication.

(B) Publication(s) must be approved and CEU value determined by the board-approved organization.

(C) Maximum CEU values for types of original publications are as follows:

(i) A newspaper article may be worth up to 0.3 CEU.

(ii) A regional/national magazine article may be worth up to 1.0 CEU.

(iii) A case study in a peer reviewed publication, monograph, or book chapter(s) may be worth up to 2 CEUs.

(iv) A research article in a peer reviewed publication or an entire book may be worth up to 3.0 CEUs.

(D) The request and final publication(s) should be sent to the board-approved organization at least 60 days prior to the license expiration date. In the event that the publication's release will occur in the 60 days prior to the license expiration date, the author(s) may submit the request, publication in revision form, and letter from the publisher or editor which includes the expected publication release date. In the event that the publication is an entire book or book chapter(s), the author must submit the following: title page, copyright page, entire table of contents, preface or forward if present, and one book chapter authored by the licensee.

(2) Program/Course development, consultation, or teaching.

(A) First time development or presentation of, and teaching or consultation in, programs such as institutes, seminars, workshops, conferences, and college or university courses which are designed to increase professional knowledge in the field of physical therapy or other related fields may be submitted for consideration of the CE requirement. CEUs are not available for subsequent development, consultation, or teaching of the same CE program or college or university course.

(B) Program/Course development, consultation, or teaching must be approved and CEU value determined by the board-approved organization.

(C) Maximum CEU value cannot exceed twice the value of the CE program or college or university course.

(D) The licensee should submit the request with explanation and evidence of the licensee's roles and responsibilities, along with the CE program approval number, to the board-approved organization at least 60 days prior to the license expiration date. In the event that the licensee is requesting approval for activities not associated with an approved CE program, the licensee must submit the request along with the program/course objectives, outline, date(s), and location(s).

(3) Documentation for self-study CE must include supporting evidence for application to the board-approved organization and the resulting approval letter. If selected for audit, the licensee must submit the specified documentation.

(e) Approval of continuing education programs, college or university courses, or self-study by the board-approved organization.

(1) Pursuant to a Memorandum of Understanding (MOU) with the board, the Texas Physical Therapy Association (TPTA) shall act as the board-approved organization and shall be authorized to evaluate and approve continuing education programs, college or university courses, or self-study for purposes of compliance with mandatory CE requirements as set by the board. This authority shall include authority to give, deny, withdraw and limit approval of programs, college or university courses, or self-study, and to charge and collect fees as set forth in the MOU and in the statute and rules governing the board and the practice of physical therapy in Texas.

(2) To be recognized as qualifying continuing education, a program, college or university course, or self-study must be evaluated and approved by the TPTA. A program may be approved before or after the licensee attends it.

(3) To apply for program approval, the licensee or program sponsor must submit a fee as approved by the board with the CE approval application and any additional documentation as specified in §341.3 to the TPTA. Interested parties may contact the TPTA in Austin, Texas, 512/477-1818, www.tpta.org. College or university courses are exempt from fees.

(4) A program may be provided more than one time and at different locations within one year from the date that it is first offered without payment of additional fees.

(5) Sponsors of approved programs may use the following statement in publicity: "This course has been approved by the Texas Board of Physical Therapy Examiners as meeting continuing education requirements for physical therapists and physical therapist assistants."

(6) Interested parties may contact the TPTA to inquire if a particular program is approved. A list of approved programs is available on the TPTA web site.

(7) Pursuant to the MOU, the TPTA shall provide quarterly reports to the board of its activities. Additionally, the TPTA shall report to the board the results of periodic quality assurance follow-up or review of a representative sample of approved continuing education programs. In the event of sponsor noncompliance, results will be reported to the board in writing for further investigation and direction.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
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For further information, please call: (512) 305-6900

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 325. CERTIFICATES OF COMPETENCY

The Texas Commission on Environmental Quality (commission) adopts the repeal of §§325.16, 325.18, 325.20, and 325.100 *without changes* to the proposal as published in the August 27, 2004 issue of the *Texas Register* (29 TexReg 8254).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED REPEALS

Chapter 325 provides for certificates of competency for public water supply operators and companies, including types of certificates, renewal provisions, and reciprocity with other states' certificates.

House Bill 3111, 77th Legislature, 2001, created new Texas Water Code, Chapter 37, to consolidate the administrative requirements for licensing and registration programs administered by

the commission. In 2001, the commission repealed most of Chapter 325 and adopted new 30 TAC Chapter 30, Occupational Licenses and Registrations. Chapter 30 contains all the requirements for the occupational licensing and registration programs administered by the Compliance Support Division. Subchapters A and B are the remaining subchapters in Chapter 325 that need to be repealed. The rules review adoption, published in this issue, found that the reasons for the rules in Chapter 325 do not continue to exist.

SECTION BY SECTION DISCUSSION

Chapter 325, which includes Subchapter A, Certification of Public Water System Operators and Public Water System Operations Companies; and Subchapter B, Certification of Wastewater Operators and Wastewater Operations Companies, is repealed because the commission determined that the rules in Chapter 325 are no longer needed.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that this rulemaking action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. This rulemaking action does not meet the definition of a "major environmental rule" because as part of the 1998 regulatory reform process, the commissioners directed staff to eliminate requirements that are redundant to existing provisions in other rules. This rulemaking action eliminates redundant rules. This rulemaking action does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs because this rulemaking action simply repeals rules that are currently addressed in other sections of the commission's rules. This rulemaking action is not anticipated to adversely affect in a material way the environment or the public health and safety of the state or a sector of the state.

In addition, this rulemaking action does not exceed the four applicability requirements of Texas Government Code, §2001.0025(a)(1) - (4) in that the rulemaking does not: 1) exceed a standard set by federal law; 2) exceed an express requirement of state law; 3) exceed a requirement of a delegation agreement; or 4) adopt a rule solely under the general powers of the agency. In this case, the sections of Chapter 325 that are being repealed do not meet any of these requirements. First, there are no federal standards that the rulemaking action would exceed. Second, the rulemaking action does not exceed an express requirement of state law. Third, there is no delegation agreement that would be exceeded by the rulemaking action. Fourth, this rulemaking has been authorized by Texas Government Code, §2001.039, which requires state agencies to review and consider for readoption each of their rules every four years. Therefore, the commission does not adopt the repeal of these rules solely under the commission's general powers.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for the repeals in accordance with Texas Government Code, §2007.043. The commission's assessment indicates that Texas Government Code, Chapter 2007 applies to the repeals and that these repeals do not constitute a statutory or constitutional taking.

The specific purpose of this rulemaking action is to eliminate redundant sections of commission rules. House Bill 3111, 77th Legislature, 2001, created new Texas Water Code, Chapter 37, to consolidate the administrative requirements for ten licensing and registration programs administered by the commission.

This rulemaking action does not place any burden on real property and it does not obtain any benefit to society from the proposed use of private real property because it does not directly apply to the ownership or use of a particular parcel of private real property.

This rulemaking action does not burden an owner of real property in a manner that would be a statutory or constitutional taking. Specifically, the repeals do not affect a landowner's rights in private real property because this rulemaking action does not burden (constitutionally) nor restrict or limit the owner's right to property, nor reduce its value by 25% or more beyond that which would otherwise exist in the absence of the rules. This rulemaking action simply repeals redundant sections of commission rules.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking action and found that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the repeals are not subject to the Coastal Management Program

PUBLIC COMMENT

A public hearing was not held on the proposed repeals. The public comment period ended at 5:00 p.m. on September 27, 2004, and no comments were received.

SUBCHAPTER A. CERTIFICATION OF PUBLIC WATER SYSTEM OPERATORS AND PUBLIC WATER SYSTEM OPERATIONS COMPANIES

30 TAC §§325.16, 325.18, 325.20

STATUTORY AUTHORITY

The repeals are adopted under Texas Water Code, §5.102, which grants the commission the authority to carry out its powers under the Texas Water Code; §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which requires the commission to establish and approve all general policy of the commission by rule; §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state; and Texas Government Code, §2001.039, which requires state agencies to review and consider for readoption each of their rules every four years and either readopt, readopt with amendments, or repeal the rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stephanie Bergeron Perdue
Director, Environmental Law Division
Texas Commission on Environmental Quality
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Proposal publication date: August 27, 2004
For further information, please call: (512) 239-0348

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SUBCHAPTER B. CERTIFICATION OF WASTEWATER OPERATORS AND WASTEWATER OPERATIONS COMPANIES

30 TAC §325.100

STATUTORY AUTHORITY

The repeals are adopted under Texas Water Code, §5.102, which grants the commission the authority to carry out its powers under the Texas Water Code; §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which requires the commission to establish and approve all general policy of the commission by rule; §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state; and Texas Government Code, §2001.039, which requires state agencies to review and consider for readoption each of their rules every four years and either readopt, readopt with amendments, or repeal the rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stephanie Bergeron Perdue
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-0348

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 13. CONTROLLED SUBSTANCES
SUBCHAPTER E. PRECURSORS AND APPARATUS

37 TAC §13.116

The Texas Department of Public Safety adopts an amendment to §13.116, concerning Immediate Precursor List, without changes to the proposed text as published in the December 3, 2004, issue of the *Texas Register* (29 TexReg 11308).

The amendment to §13.116 is necessary in order to add Lithium metal removed from a battery and immersed in kerosene, mineral spirits, or similar liquid that prevents or retards hydration to the list of substances that are designated by the director of the Texas Department of Public Safety to be "immediate precursors."

The clandestine production of Methamphetamine is at an all time high in the state of Texas. Two main reaction methods are used to produce it.

One method involves the use of Ephedrine or Pseudo-ephedrine tablets, adding anhydrous Ammonia, and using Lithium as a catalyst. This reaction method is the most common method used in the northern half of the state. The persons using this method of Methamphetamine production obtain Lithium from alkaline batteries, which are readily available in every grocery, convenience, and hardware store. They have to pry open the battery to remove the Lithium, and once removed, they have to immerse it in a liquid like kerosene to prevent it from reacting with moisture in the air.

Health and Safety Code, §481.124(b) already states: For purposes of this section, an intent to unlawfully manufacture the controlled substance methamphetamine is presumed if the actor possesses or transports:.(2) lithium metal removed from a battery and immersed in kerosene, mineral spirits, or similar liquid that prevents or retards hydration;.

To help prosecutors prove that the possessor or transporter of this Lithium is committing an offense, the Lithium must be named as a chemical precursor.

No comments were received regarding adoption of the amendment.

The amendment is adopted pursuant to the Health and Safety Code, Chapter 481, including §481.003, which authorizes the director to adopt rules to administer the chapter, and §481.077(b), which authorizes the director to designate a substance to be an immediate precursor by rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 27, 2005.

TRD-200500376
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: February 16, 2005
Proposal publication date: December 3, 2004
For further information, please call: (512) 424-2135

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PART 3. TEXAS YOUTH COMMISSION

CHAPTER 87. TREATMENT

SUBCHAPTER B. SPECIAL NEEDS OFFENDER PROGRAMS

37 TAC §87.81

The Texas Youth Commission (TYC) adopts the repeal of §87.81, concerning Special Needs Offender Program, without changes to the proposal as published in the December 10, 2004, issue of the *Texas Register*(29 TexReg 11461).

The justification for the repeal is to allow for publication regarding youth who have engaged in certain high-risk behavior.

The repeal will eliminate duplicate information regarding disciplinary consequence and treatment interventions in a highly secure and structured environment for youth who have engaged in certain high-risk behaviors.

No comments were received regarding adoption of the repeal.

The repeal is adopted under the Human Resources Code, §61.034, which provides the Texas Youth Commission with the authority to make rules appropriate to the proper accomplishment of its function.

The adopted rule implements the Human Resources Code, §61.034.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 26, 2005.

TRD-200500373
Dwight Harris
Executive Director
Texas Youth Commission
Effective date: February 15, 2005
Proposal publication date: December 10, 2004
For further information, please call: (512) 424-6301

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PART 6. TEXAS DEPARTMENT OF CRIMINAL JUSTICE

CHAPTER 151. GENERAL PROVISIONS

37 TAC §151.4

The Texas Board of Criminal Justice adopts the amendment to §151.4, concerning Public Testimony and Comments to the Texas Board of Criminal Justice without changes to the text as proposed in the December 24, 2004, issue of the *Texas Register* (29 TexReg 11942).

The purpose of the amendments are to rename the Rule title and clarify procedures for presenting public testimony on agenda items versus presenting public comment on topics under the jurisdiction of the Board.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Government Code, §492.013, §492.007and Chapter 551, The Open Meetings Act.

Cross Reference to Statutes: Texas Government Code, §492.013, §492.007 and Chapter 551, The Open Meetings Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 28, 2005.

TRD-200500413
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Effective date: February 17, 2005
Proposal publication date: December 24, 2004
For further information, please call: (512) 463-0422

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CHAPTER 152. CORRECTIONAL INSTITUTIONS DIVISION SUBCHAPTER D. OTHER RULES

37 TAC §152.71

The Texas Board of Criminal Justice adopts new §152.71, concerning Acceptance of Gifts and Grants Related to Buildings for Religious and Programmatic Purposes without changes to the text as proposed in the December 17, 2004, issue of the *Texas Register* (29 TexReg 11563). The purpose of the new rule is to clarify procedures and language relating to gifts and grants.

No comments were received regarding adoption of the new rule.

The new rule is adopted under Texas Government Code, §492.013(f), and §501.009.

Cross Reference to Statutes: Texas Government Code, §492.013(f), and §501.009.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 28, 2005.

TRD-200500412
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Effective date: February 17, 2005
Proposal publication date: December 17, 2004
For further information, please call: (512) 463-0422

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 1. MANAGEMENT

SUBCHAPTER E. PROCEDURES IN CONTESTED CASES

43 TAC §§1.21 - 1.24, 1.26, 1.30

The Texas Department of Transportation (department) adopts amendments to §§1.21-1.24, §1.26, and §1.30, concerning procedures in contested cases. The amendments to §§1.21-1.24, §1.26, and §1.30 are adopted without changes to the proposed text as published in the November 12, 2004 issue of the *Texas Register* (29 TexReg 10468) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Government Code, §2003.050, provides that in contested cases before the State Office of Administrative Hearings (SOAH), all proceedings are governed by SOAH's procedural rules unless SOAH has specifically adopted the procedural rules of the agency.

Section 9.2 of this title (relating to Contract Claim Procedure) is being simultaneously amended in this publication. All contract claims must be heard through the contested case procedure before they can be appealed to SOAH.

The department amends §§1.21-1.24, §1.26 and §1.30 to update and clarify the types of claims that are considered contract claims and procedures before SOAH, and to clarify that the department may bring a contested case.

The amendments to §1.21 update the cross-reference to the Occupations Code relating to the sale or lease of motor vehicles, which was codified by House Bill 2813, 77th Legislature, 2001.

The amendments to §1.22 add the definition of "claim." This definition includes the statutory claims that are eligible to be appealed to SOAH. The definition for contract claim is updated to include all the types of claims that are considered contract claims and to add a description of the type of claim to the citation for ease of reference. Contract claims differ from other claims in that they go through the department's contract claim committee as outlined in §9.2 of this title (relating to Contract Claim Procedure).

The main substance of the definition of "person" is deleted from §1.22 and moved to §1.23 as a more appropriate location. The part of the definition excluding the department is removed since it would prevent the department from filing a petition under this section, and the department is specifically authorized to initiate a contested case under existing §1.26. The statement that a contract claim may not be appealed to SOAH unless the contract claim procedure had been completed has been added to comply with the spirit of Transportation Code, §201.112, which authorizes the Texas Transportation Commission (commission) to establish a contract claim procedure, and allows a person who is dissatisfied with the department's resolution of a claim to request a formal administrative hearing before SOAH.

The amendments to §1.24 clarify that the statement of facts should include as an attachment the document issued by the department notifying the petitioner of the decision or action challenged by the petitioner. This attachment will serve as an immediate reference for the basis of the claim. A requirement for the department reference number is added in order for the department to more easily route the claim and assemble the appropriate documents and response. References to the department regarding settlement have been changed to "a party" because the department may also be a petitioner in accordance with the existing §1.26 and the non-department party may offer a settlement.

Section 1.26 is amended to add service of notice of hearing, standard of review, and burden of proof. The threshold for what has been considered adequate notice of a hearing has differed with the administrative judges. This amendment clarifies the notice. A notice of a hearing will be considered sufficient if it includes a copy of the petition and the following information (unless it is stated in the petition): a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing is to be held; and reference to the particular sections of the statutes and rules involved. This notice complies with the requirements of Government Code, §§2001.051-2001.053, concerning contents of notice, and gives each party notice of the substance of the claim.

Pursuant to 1 TAC §155.41(b), the department may allocate the burden of proof, but only allocates the burden to the department where money is sought by the department. In all other instances, the party challenging a department decision or action bears the burden of proof. The standard of review for claims that have already received a review is whether the agency's actions were based on fraud, misconduct, or such gross mistake as would imply bad faith or failure to exercise an honest judgment. The categories that fall under this standard are those categories related to: contract claims; denial or cancellation of sign permits; the denial, suspension, or revocation of a license; and the suspension or revocation of registration for motor carriers and leasing companies. All contract claims fall under the jurisdiction of the contract claim committee pursuant to §9.2 of this title (relating to Contract Claim Procedure), which renders a proposal. The rule pertaining to denial of a permit of a sign along a rural road specifically states that issuance of a permit does not create a property right.

A manager's determination that revocation, suspension, or cancellation of a license or permit, or the suspension or revocation of registration for motor carriers or leasing companies, is the appropriate sanction for the violations found by the inspector is an official act for which there is a presumption in favor of its legality. Under the common law of Texas, there has been a rebuttable presumption in favor of the legality of official acts at least as far back as 1937. This presumption guided the state courts prior to the establishment of SOAH in the mid 1990s, as part of the legislature's attempts to limit the need for judicial recourse while still ensuring independent, third-party review of executory actions. Such orders are not only made prima facie valid by statute, but being official acts there is a presumption in favor of their legality; and the one attacking them upon the grounds that there was not sufficient evidence before the board or administrator to authorize agency action or decision must prove that fact on an appeal from the order canceling such license, permit, or registration.

The manager is not depriving petitioner of a legitimate liberty or property interest, which would invoke a right to a higher level of procedural due process under the Fourteenth Amendment to the U.S. Constitution. Numerous state courts have determined that a permitee or licensee has no vested right to participate in a regulated activity, but has a mere privilege of participation in accordance with the terms of the relevant law, and accepts his permit or license subject to the authority of the executive regulatory authority to cancel it for any violation of the statute or any regulation promulgated by the executive regulatory authority under the authority of the relevant act.

Although a license is a privilege that may be revoked or suspended, an agency's power to do so is limited by constitutional proscriptions against unreasonable or arbitrary action.

The standard of review is higher for claims that are not reviewed by a decision maker. These include claims made under Transportation Code, §681.012, concerning seizure and revocation of disabled placards.

Subsection (d) is added to §1.26 to clarify which party bears the burden of proof. A party seeking monetary damages or penalties shall bear the burden of proof. In all other instances, the party challenging a department decision or action shall bear the burden of proof. This is consistent with case law and standards of proof in court cases.

Section 1.30(a) is amended to allow for parties to file exceptions if the administrative law judge amends the proposal for decision so that the parties have an opportunity to respond to the judge's decision.

COMMENTS

No comments on the proposed amendments were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department; and more specifically Transportation Code, §201.112, which provides the commission with the authority to establish rules governing procedures in certain contract claims; and under Government Code, §2001.004, which requires each agency to adopt rules stating the nature and requirements of all available formal and informal procedures.

CROSS REFERENCE TO STATUTE: Government Code, §2001.004.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 28, 2005.

TRD-200500390
Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: February 17, 2005
Proposal publication date: November 12, 2004
For further information, please call: (512) 463-8630

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CHAPTER 9. CONTRACT MANAGEMENT
SUBCHAPTER A. GENERAL

43 TAC §9.2

The Texas Department of Transportation (department) adopts amendments to §9.2, concerning contract claim procedure. The amendments to §9.2 are adopted without changes to the proposed text as published in the November 12, 2004 issue of the *Texas Register* (29 TexReg 10471) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Transportation Code, §201.112, governs contract claims that are heard before the department's contract claim committee.

On April 16, 2004, the Texas Supreme Court issued an opinion on certified questions from the Fifth Circuit concerning the case Interstate Contracting Corporation v. the City of Dallas. The decision was that prime contractors could bring pass through claims for subcontractors if the prime contractor had continuing liability to the subcontractor. The amendments include the subcontractor's claims that are brought through the prime contractor, but require the prime contractor to remain liable to the subcontractor for damages caused by the prime contractor to the subcontractor.

Because of this recent court decision, §§1.21-1.24, §1.26, and §1.30 of this title (relating to Contested Case Procedure) are simultaneously amended in this publication along with these amendments to §9.2. All contract claims heard by the State Office of Administrative Hearings (SOAH) must be heard first by the contract claim committee before they can be reviewed by SOAH in accordance with Transportation Code, §201.112.

The adopted amendments to subsection (a) include changing the definition of "commission" to the Texas Transportation Commission. The number of members was changed from three to five by Senate Bill 409, 78th Legislature, Regular Session, 2003, and the number of members is not necessary to the definition. The definition of "contract claim" is amended to add a description of the type of claim to the citation for ease of reference. The definition is further clarified to include new claims that have been authorized by recent case law. These are claims that may be brought based on privity of contract or on a prime contractor's continuing liability to a subcontractor for alleged damages sustained by the subcontractor arising from the contract, but not if the subcontractor releases the prime contractor from liability for damages caused by the prime contractor to the subcontractor. The definition of "contractor" has been moved to the definition of "prime contractor," to avoid confusion with references to subcontractor. A definition has been added for a "project" to include that portion of a contract that can be separated into a distinct facility or work unit from the other work in the contract.

In subsection (b) the disputes involved are clarified to be those disputes relating to the project engineer's final decision since a project engineer has the authority to make a final decision regarding the project, and that authority had been recognized in case law. A reference to the "contractor" regarding resolution of a claim has been changed to "either party" because the department may initiate a contested case on its own initiative in accordance with §1.26 of this title (relating to Initiation of Contested Cases). If the department can initiate a case with SOAH under §1.26 of this title, and because the contract claim cases must first go before the contract claim committee before they can be filed with SOAH under §1.24 of this title (relating to Content of Petition), then the department needs to have the ability to go before the contract claim committee. "Contractor" is also changed to "claimant" in several areas for the same reason.

A statute of limitations of one year to file a claim has been added to subsection (b)(2). The claim must be filed within one year after the date of the acceptance of the project, as defined in Subsection (a). The current rules do not state a deadline for filing. One year is a reasonable time for a claimant to determine whether a claim exists. Dividing the project into units enables claims to be filed as each segment of a long term contract is completed.

Subsection (b)(3) is added to clarify that a party with a contract claim, even when related to a direct appeal to the State Office of Administrative Hearings (SOAH) of a contract sanction, must complete the contract claim committee procedure before an appeal can be made to SOAH. This discourages the bringing of claims on a piecemeal basis, and encourages the opportunity for the entire claim to be resolved at the contract claim committee level.

Subsection (b)(6) relates to the 20 day requirements for acceptance of the contract claim committee's final order or for an appeal by either party.

The substance of subsection (b)(8) has been moved to subsection (b)(7) and the subsequent subparagraphs renumbered as a more logical flow. The current subsection (b)(8) relates to the contract claim committee's decision being final if there is no appeal within 20 days. New subsection (b)(7) adds that the recommendation is forwarded to the executive director for adoption as a final order, and that further litigation is barred by the doctrines of issue and claim preclusion. The issuance of a final order by the executive director, rather than the contract claim committee, better fits within the structure of Government Code, Chapter 2001, the Administrative and Procedure Act.

COMMENTS

No comments on the proposed amendments were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §201.112, which provides for the department to establish rules for the informal resolution of a claim arising out of certain contracts.

CROSS REFERENCE TO STATUTE: Transportation Code, §201.112.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 28, 2005.

TRD-200500391
Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: February 17, 2005
Proposal publication date: November 12, 2004
For further information, please call: (512) 463-8630

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SUBCHAPTER C. CONTRACTING FOR ARCHITECTURAL, ENGINEERING, AND SURVEYING SERVICES

The Texas Department of Transportation (department) adopts amendments to §§9.30 - 9.39, §9.41, and §9.42, new §9.43, and the repeal of §9.40 and §9.43, concerning contracting for architectural, engineering, and surveying services. The amendments to §§9.30 - 9.39, §9.41, and §9.42, new §9.43, and the repeal of §9.40 and §9.43 are adopted without changes to the proposed text as published in the November 12, 2004 issue of the *Texas Register* (29 TexReg 10474) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS, NEW, AND REPEALED SECTIONS

Architectural, engineering, and surveying services are procured by the department in accordance with Government Code, Chapter 2254, Subchapter A, and 23 CFR §172.5.

The adopted amendments clarify and refine the language to improve consistency in the interpretation and application of procedures for provider precertification, and the selection, negotiation, management, and evaluation of contracts with architects, engineers, and surveyors.

Section 9.30 is amended to revise the reference to Transportation Code §361.042, which was renumbered as §361.032 by the 78th Legislature, Regular Session, 2003. Section 9.30 is also amended to update the title of referenced §9.33 to its revised title (relating to Notice of Intent and Letter of Interest).

Section 9.31 is amended to: delete the definitions of "constructability," "construction engineering," "construction inspection," "construction management," "consultant review committee (CRC)," "FONSI," "graduate engineer," "IESNA," "ITS," and "small business concern" as they are no longer used; clarify the definition of "administrative qualification;" add a definition for "Audit Office;" add a definition for "specific deliverable contract," which replaces deleted "project specific contract" and clarifies the types of contracts; clarify the definition of "department project manager" to include management of contracts; add a definition for "Design Division;" revise the definition of "historically underutilized business" to reflect the name change of the General Services Commission to the Texas Building and Procurement Commission; clarify the term and definition of "indefinite deliverable contract;" add a definition for "indirect cost rate guidance" to help determine indirect costs and to replace the term "overhead guidelines" which is deleted; add a definition for "letter of interest" (LOI) which is the prime provider's responsive document; revise the definitions of "licensed state land surveyor" to include the citation to the laws concerning this license as re-codified in Occupations Code by the 78th Legislature, Regular Session; revise the definitions of "long list" to include that the LOI must be acceptable, "lower tier debarment certification" to remove a reference to a form that is no longer used, and "metropolitan district" to add the Pharr, El Paso, Corpus Christi and Lubbock districts; add a definition for "notice of intent" (NOI) as the department's indication it intends to enter into professional contracts;" revise the definition of "short list meeting" to include distribution of the Interview and Contract Guide; and delete the term "technical precertification," which is replaced with the clearer term "precertification."

Section 9.32 is amended by reorganizing the section into subsections (a) and (b). Subsection (a) is titled "Policy" and includes paragraphs (1)-(8) as they currently exist. Subsection (b) is added and titled "Organizations" and is equivalent to §9.33(a)(3) which is deleted and relocated to this section as a more appropriate location.

Section 9.33 is amended to change the section title to "Notice of Intent and Letter of Interest" to clarify the two distinct processes that this section covers. Subsection (a) is renamed "Notice of Intent (NOI)" for clarification. References to an RFP number are deleted because there is no longer a defined RFP number. References throughout this section to listed categories in §9.43 are

revised because the repeal of §9.43 will eliminate listed categories since they will be posted on the department's website. The list of what the NOI identifies is expanded to include the assigned HUB or DBE participation goal for the contracts with additional text relocated to this more appropriate location from §9.37(c). Subparagraphs (a)(2)(F)-(H) are deleted because this information is no longer contained in the newspaper notices. Only the essential information is published in the newspaper, and a reference to the department's website is given for more information. Paragraph (a)(3) is deleted and relocated to a more appropriate location in §9.32. The requirement for the Design Division Director to approve an increase in the maximum number of pages in the letter of interest (LOI) is eliminated. The previously required approval adds unnecessary time to the process and is not warranted based on review of request history. Clarification is added to indicate that stated requirements, including length, apply unless specified otherwise in the NOI because the need for additional pages is typically associated with larger and more complicated projects. Clauses (i) and (ii) under subsection (b)(4)(B) are reversed for clarity and amended to allow the prime provider's and subprovider's key personnel to be replaced during the selection process and before contract execution only by another person from the prime provider's or subprovider's proposed team in the LOI and approved by the consultant selection team (CST). This provides a consistent process for a situation that occurs frequently and allows the decision control to remain with the CST. Wording for replacement of the project manager during the selection and award process is clarified to indicate replacement is acceptable by a team member during the selection process and before contract execution. Under the list of what the LOI shall include, the reference to similar project-related experience is revised to eliminate reference to information in the precertification database. This data is only accessible to precertification review officers for the purpose of precertification only. The data is not collected in a format for the purpose of evaluating an individual's experience for contract selection. The name and contact information for references is clarified to be for references from the department or other entities.

Section 9.34 is renamed "Short List Determination" for consistency in section titles. The consultant selection team composition requirements are modified to require a minimum of one professional engineer for engineering contracts, a minimum of one professional engineer or registered or licensed professional land surveyor for surveying contracts, and a minimum of one registered architect for architectural contracts. This change further ensures a qualified selection team for the purpose of evaluating and selecting providers based on their proposed qualifications.

In order to protect the department and the general public, firms may be disqualified from the long list if the department or the firm's references have knowledge that the firm or an employee of the firm has a record of unprofessional conduct, including, but not limited to, whether the appropriate licensing board has cited the firm or employee for a violation of its rules concerning conduct. The long list qualification is clarified to indicate that the letters of interest are what are specifically reviewed for submittal requirements and precertification requirements. The team is not actually evaluated until after the long list is determined. The long list evaluation was revised to clarify that the CST and not the department reviews the LOIs. It is also clarified that the CST will consider the identified criteria in its review of the long-listed providers and not all interested providers. The second criterion listed is revised to clarify that the project manager's experience refers to the provider's project manager. The acronym RIF is identified as relative importance factor. Subsection (f) is renamed Short List to more appropriately represent the information addressed. The acronym RFP is identified as request for proposal.

Section 9.35 is amended to delete language regarding the opportunity to conduct a short list meeting. A short list meeting is at the discretion of the managing officer who best knows the complexity of the project. Subsection (e) clarifies where or when references are identified. Reference to Consultant Review Committee (CRC) approval of other criteria is eliminated because the CRC no longer functions in this capacity.

Section 9.36 is renamed "Short List Interviews and Evaluation" for consistency and clarification in section titles. The section is amended to delete the last sentence of subsection (a) because it potentially conflicts with the previous sentence that clearly states the required attendance of the prime provider's project manager at an interview. Subsection (d) is renamed "Interview evaluation criteria" for consistency and clarification in subsection titles. Subsection (d) is revised to incorporate language consistent with the previous section and clarify that the CST will evaluate interviews based on the listed criteria. The criteria wording is revised to be consistent with the previous section, §9.35. Performance scores or references will now be considered in the interview evaluation, whereas currently they are only considered if no proposal is required. Past performance is an important indicator as to how a firm will perform and the addition here allows it to be considered in the possible procurement scenarios of an interview with no proposal, a proposal with no interview, and an interview and proposal. Reference to CRC approval of other criteria is eliminated because the CRC no longer functions in this capacity.

Section 9.37 is amended to add additional steps for breaking a tie. Subsection (c) is deleted and relocated to a more appropriate location in §9.33. Reference to the CRC is replaced by reference to the Design Division for review of the selection package. Renumbered subsection (f) is revised to clarify information required by the selected provider for negotiation. References to the relevant law regarding negotiation requirements have been added. The reference to 23 CFR §172.9 is replaced by the reference to 23 CFR §172.5(c) which is the current CFR section addressing federally funded contracts not being based on percentage of construction cost. Subsection (f)(2) is renamed "Negotiation Period" to more appropriately reflect the information covered. The section is amended to allow approval of a unique negotiation schedule for any contract and not just multiple contract selections. The section is amended to clarify order of negotiation for single and multiple contract selection processes. Reference to the professional provider is clarified to refer to the prime provider.

Section 9.38 is amended to clarify applicable credit for DBE/HUB participation and eliminate the unnecessary statement that a HUB prime provider perform at least 25% of the work. The section already states that a prime provider shall perform at least 30% of the contracted work. The section is amended to delete the restriction that no subprovider may perform a higher percentage of work than the prime provider. The prime provider is required to perform at least 30% of the work and is ultimately responsible for the contracted work. Elimination of this constraint will allow the prime provider more flexibility in determining the optimum distribution of work among subproviders. Language is also deleted regarding subcontract content and review requirements since current standard prime contract language adequately addresses subcontract requirements. The section

is amended to specify prior written consent of the department for prime provider project manager replacement. Reference to department Form 132 is eliminated since this is no longer a form required by the department. A subsection is added for indefinite deliverable contract work authorizations, which are negotiated during the contract period. The subsection addresses the procedure of ending unsuccessful negotiations for a work authorization with one provider before initiating negotiations with another. The section is amended to clarify that the department's audit office may perform an audit. The section is also amended to reflect the pending changes to the department's provider performance evaluation form and process regarding when and how a provider is evaluated.

Section 9.39 is renamed "Selection and Contract Types" to reflect section content. Subsection (a) is added to address selection types. The number of selection types is changed from four to three since one of the four currently identified is best addressed as a contract type. The cause for an emergency contract selection is clarified and subparagraphs are added to address eligibility of the firm's project manager, the notification process, and the selection process. Subsection (b) is added to address contract types that are identified as indefinite deliverable and specific deliverable. Limitations of the indefinite deliverable contract type are clarified to specify divisions as eligible for the same $5 million dollar amount as a metropolitan or border district. The rules have never limited the divisions, except for the turnpike division, which was limited to $5 million. Since the divisions support 25 districts statewide, the higher number is necessary. The Lubbock and Corpus Christi districts' limitations are increased from $2 million to $5 million since population growth has resulted in their addition to the definition of "metropolitan district." El Paso and Pharr have also been added to that definition, but their limitation was already at $5 million since they also are border districts.

Amendments also allow the maximum amount of $5 million and the two year work authorization period to be exceeded if approved by the Texas Transportation Commission (commission) prior to NOI publication to accommodate some of the very large projects such as the Trans-Texas Corridor. This will allow for additional flexibility, if warranted, in the use of this contract type.

Section 9.40 is repealed. Information in this section related to DBE/HUB goals is adequately addressed in §§9.50 et.seq. of this chapter (relating to Business Opportunity Program).

Section 9.41 is amended to appropriately reference §9.43 as it is repealed and reenacted as a new section. Subsections (a) and (d)-(g) are renamed for clarification. Subsection (b) is revised to clarify who may apply. Precertification questionnaire is changed to precertification application. Reference to the CRC is changed to the Design Division. Reference to a precertification information packet is deleted because the information is now available on the department's website. The list of information now available is clarified. Reference to prime providers and subproviders is revised to simply reference providers or a firm for clarification and consistency where appropriate. Former subsection (c), regarding Instructions, is deleted since there is no need to annually publish the instructions in the *Texas Register* because the process and instructions are currently maintained on a daily basis on the department's website. Under renumbered subsection (e), clarification is added with respect to a firm's precertification status and a firm employee's precertification status. Under renumbered subsection (h), regarding Appeals, the reference to CRC is changed to Design Division in one instance and in another instance it is changed to the department for review of the information to determine precertification as the CRC no longer serves this function. The last sentence is revised to clarify a written complaint regarding precertification denial may be filed with the executive director or his or her designee.

Section 9.42 is amended to clarify which firms are exempt from administrative qualification. The reference to §9.43 is replaced by a reference to the department's website as a result of the repeal of §9.43. The typical compensation type for firms exempt from administrative qualifications is more appropriately indicated as units of service and lump sum is deleted. Reference to the CRC is replaced by reference to the Design Division. References to overhead rate are replaced by indirect cost rate as a more appropriate term. The list of acceptable indirect cost rate audit preparers is revised to include an agency of the federal government, another state transportation agency, or a local transit agency in accordance with the Single State Audit Act. The department's Audit Office will be given access to the audit work papers if the audit is performed by an independent certified public accountant. The regulations and guidelines applicable to audit report preparation are clarified. Procedures related to an indirect cost rate projection are clarified for providers who have been in operation for less than one fiscal year. Rates the department will consider by job classification are revised to include salary rates, range of rates, or average rates.

Section 9.43 is repealed and new §9.43, "Precertification Requirements," is adopted. The repeal of §9.43 eliminates the work categories, descriptions, and requirements for precertification since new §9.43 provides that this information will be maintained on the department's website. The addition of or any change to a work category will require a commission minute order. The agenda for commission meetings is posted with the Secretary of State's Office and also on the department website. By using a minute order to change the work categories, the public is afforded an opportunity to comment. Maintenance of the work categories on the website will provide more flexibility in updating categories to meet the outsourcing needs of the districts and divisions without the requirement of proposing changes to the Texas Administrative Code. New §9.43 reestablishes the following provisions from the repealed §9.43. The section allows a firm to be precertified in the technical work categories by providing the listed requirements that are maintained on the department's website. A firm may only submit an application for an individual who is employed by that firm at the time of submittal for precertification, and allows the provider to use experience that is either prior to or after licensure unless otherwise stated in a specific category. The employee must be licensed to practice in any state that is recognized by the appropriate Texas board of licensing.

COMMENTS

Comment: One comment was received relating to amended §9.34(b)(1) concerning the disqualification of a firm when there is knowledge that the firm, or an employee of the firm, has a record of unprofessional conduct including but not limited to whether the firm or an employee has been sanctioned for a violation of the rules of a licensing board. The comment acknowledged the right of the department to disqualify a proposer in the case of a breach of ethical or professional obligations that raise questions about the firm's ability to perform appropriately on a project. However, the broad nature of the proposed language was questioned with respect to having a technical violation of licensing rules by a single individual that would cause the entire firm to be disqualified.

Response: It should be noted that the proposed language is a permissive condition. A firm may indeed have an individual technical violation with respect to the rules of a licensing board and still be a qualified firm. Even though the department's intent would not be to subject an entire firm to disqualification for such an individual technical violation of licensing rules, there can be instances where the position of the individual within the firm and their actions in representing the firm make the disqualification decision appropriate with respect to the firm's ability to perform appropriately on a project. While the department must exercise reasonable judgment, the department needs the flexibility represented by the language in this section to determine the firm's qualifications to enter into future contracts and perform appropriately.

43 TAC §§9.30 - 9.39, 9.41 - 9.43

STATUTORY AUTHORITY

The amendments and new sections are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Government Code, Chapter 2254, Subchapter A, which sets forth requirements governing the procurement of professional services.

CROSS REFERENCE TO STATUTE: Government Code, Chapter 2254, Subchapter A.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 28, 2005.

TRD-200500392
Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: February 17, 2005
Proposal publication date: November 12, 2004
For further information, please call: (512) 463-8630

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43 TAC §9.40, §9.43

STATUTORY AUTHORITY

The repealed sections are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Government Code, Chapter 2254, Subchapter A, which sets forth requirements governing the procurement of professional services.

CROSS REFERENCE TO STATUTE: Government Code, Chapter 2254, Subchapter A.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 28, 2005.

TRD-200500393
Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: February 17, 2005
Proposal publication date: November 12, 2004
For further information, please call: (512) 463-8630

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CHAPTER 22. USE OF STATE PROPERTY
SUBCHAPTER B. USE OF STATE HIGHWAY RIGHT OF WAY

43 TAC §§22.10 - 22.13

The Texas Department of Transportation (department) adopts amendments to §§22.10 - 22.13 concerning the use of state highway right of way. The amendments to §§22.10 - 22.13 are adopted without changes to the proposed text as published in the December 3, 2004 issue of the *Texas Register* (29 TexReg 11328) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

The department is amending the rules covering the use of state highway right of way to clarify the requirements an applicant must follow to request a closure on the state highway system for an event or for a film/video production. These amendments are designed to preserve public safety by allowing the department sufficient time to review these requests, to require that necessary information about the planned event is submitted to the department, and to ensure that appropriate traffic control is planned and implemented.

The amendment to §22.10 adds "efficiency" as one of the criteria the department will consider when determining whether to allow the use of the state highway system for other than department business.

The amendments to §22.11 modify the definition of "banner" to accommodate banners that do not use support. The amendments also expand the existing definitions of "closure" and "controlled access highway" to describe what is considered a segment of the system. "District engineer" is amended to include the district engineer's designee so that road closure or film video requests may be handled as efficiently and expeditiously as possible once received by the department.

"State highway system" is updated to reflect the recodification of the Transportation Code, and "Manual on Uniform Traffic Control Devices" is clarified to specify that it is the Texas Manual on Uniform Traffic Control Devices. "Requestor" is defined to refer to the person, organization, or governmental entity that is requesting the closure or use of the state highway system.

"Routine traffic control" is amended to include the maximum duration of various types of events that may be handled using routine traffic control. The duration has been determined to be a length of time that will not cause a long delay to the traveling public.

The amendments also add new definitions for "Compliant Work Zone Traffic Control Device List," since the traffic control must follow this, and "professional engineer" since a professional engineer must sign traffic control plans. The Compliant Work Zone Traffic Control Device List may be requested from the department or can be found on the department's website at the following address:

http://www.dot.state.tx.us/TRF/ctrldvcs/trfteps1.htm

The term "substantial negative impacts to the environment" is added to identify what type of damage must be repaired by a company during a closure or film/video production. Definitions for "traffic control," "traffic control plan," and "traffic enforcement plan" are added to explicitly differentiate between these terms as used in this subchapter. "Workday" is defined as a weekday, non-holiday for the department.

The amendments to §22.12 are designed to clarify the requirements and procedures for those individuals requesting a closure of the state highway system for a public purpose.

The amendments to subsection (a) require that the closure last no more than seven consecutive days and that the closure must be consistent with the safety and convenience of the traveling public. This amendment will ensure that the maximum duration for any closure does not extend for an unreasonable period to the detriment of the traveling public.

The amendments to subsection (b) note that a request must be submitted to the district of the department in which the closure occurs and expands the information that the requestor must submit regarding event details. The amendments also clarify that requests that are made less than thirty days prior to the date of the event will not be considered unless an exception is approved by the district engineer and the notice is adequate for the requestor and the department to coordinate.

The amendments add a new subsection (c) to state specific requirements for traffic control plans that must be submitted with these requests. The revisions require that the traffic control plan must adhere to the latest edition of the Texas Manual on Uniform Traffic Control Devices, that the traffic control plan clearly define all phases and devices that will be used for traffic control, allow the department to request additional detail in the traffic control plan where warranted, allow the department to require that traffic control plans of sufficient complexity be approved by a professional engineer, and also allow the department to waive the requirement that a traffic control plan be submitted if the proposed closure only requires law enforcement personnel and the district engineer determines public safety is not in question. These changes will preserve public safety by ensuring that appropriately safe traffic control is in place during closures on state highway right of way.

Subsections (d) and (e) add provisions that must be included in the written agreement, including a statement of the approximate number of people, number and type of animals and equipment, and a description of any planned physical modification of any man-made or natural features in or adjacent to the right of way. The amendments include an expansion of the list of roadway items for which the requestor is responsible if damage should occur, a statement that all traffic control devices must be included in the department's Compliant Work Zone Traffic Control Device List, and a statement that the department reserves the right to inspect the implementation of the traffic control plan and request changes. The agreement must also include a statement that the appropriate law enforcement agency has reviewed and approved the proposed traffic control plan or measures, or if the appropriate law enforcement agency is unsure of the adequacy of proposed traffic control that it will contact the department for consultation at least 10 work days prior to the event. A statement is required acknowledging that the requestor will complete all changes to the traffic control plans as requested by the department within the requested timeframe or the agreement will be terminated, and a statement that failure to cooperate with the department on these issues will result in the department reporting this failure to the Texas Department of Public Safety (DPS) and may result in denial of future use of the right of way for three years. These changes ensure that appropriate traffic control measures are taken to protect the safety of the traveling public and to maintain the efficient operation of the state highway system. The reporting and denial of future use will discourage requestors from ignoring safe practices.

Subsection (f) is added to allow for the execution of multi-year agreements between the department and the requestor for annual events that do not change substantially from year-to-year. The agreement may not be longer than five years and the requestor must submit proof of insurance annually. This will save duplicative effort while ensuring that the department and the traveling public are adequately covered by insurance.

Subsection (g) is amended to require that the department must be notified by law enforcement at least seven workdays or ten workdays, if by letter, prior to those closures that require only routine traffic control and that this notification must contain sufficient detail to allow the department to evaluate the event. This ensures not only an evaluation, but that two events will not be scheduled in the same location at the same time.

Subsection (i) is amended to update a department job title.

The amendments to §22.13 are designed to make minor clarifications to the requirements for those individuals requesting access to department right of way for film, video, or other productions. The amendments to subsection (c) clarify that requests that are made less than thirty days prior to the date of the event will not be considered unless an exception is approved by the district engineer and the notice is adequate for the requestor and the department to coordinate.

Subsection (d) is amended to allow the department to disapprove requests made if the department has not been provided adequate review time or if the requestor has failed to follow a traffic control plan within the preceding three years. These amendments will ensure that any film or video production on the state highway right of way will not endanger the safety of the traveling public or the state's transportation infrastructure.

The amendments add a new subsection (e) to state specific requirements for traffic control plans that must be submitted with these requests. The revisions require that the traffic control plan must adhere to the latest edition of the Texas Manual on Uniform Traffic Control Devices, that the traffic control plan clearly define all phases and devices that will be used for traffic control, that the department may request additional detail in the traffic control plan where warranted, that the department may require that traffic control plans of sufficient complexity be approved by a professional engineer, and that the department may waive the requirement that a traffic control plan be submitted if the proposed closure only requires law enforcement personnel and the district engineer determines public safety is not in question. These changes will preserve public safety by ensuring that appropriately safe traffic control is in place during closures on state highway right of way.

The amendments to subsection (f) add additional provisions that must be included in the written agreement between the department and the requestor including an expansion of the list of roadway items for which the requestor is responsible if damage should occur, a statement that all traffic control devices must be included in the department's Compliant Work Zone

Traffic Control Device List, a statement that the department reserves the right to inspect the implementation of the traffic control plan and request changes. The agreement must also include a statement that the appropriate law enforcement agency has reviewed and approved the proposed traffic control plan or measures, or if the appropriate law enforcement agency is unsure of the adequacy of proposed traffic control that it will contact the department for consultation at least 10 work days prior to the event. A statement is required acknowledging that the requestor will complete all changes to the traffic control plans as requested by the department within the requested timeframe or the agreement will be terminated, and a statement that failure to cooperate with the department on these issues will result in the department reporting this failure to the Texas Department of Public Safety (DPS) and may result in denial of future use of the right of way for three years. These changes are adopted to ensure that appropriate traffic control measures are taken to protect the safety of the traveling public and to maintain the efficient operation of the state highway system during film or video productions. The reporting and denial of future use will discourage requestors from ignoring safe practices.

Subsection (h) is amended to update a department job title.

The amendments to subsection (i) modify the existing requirements for signing related to film and video productions to ensure compliance with department standards. These changes help preserve the safety of the traveling public by ensuring that signs and sign supports used on the state highway system in conjunction with these types of productions are safe and meet accepted department standards. The amendments also update a cite to the current location of the rules relating to signs on state highway right of way.

COMMENTS

No comments were received on the proposed amendments.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 28, 2005.

TRD-200500394
Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: February 17, 2005
Proposal publication date: December 3, 2004
For further information, please call: (512) 463-8630

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CHAPTER 27. TOLL PROJECTS
SUBCHAPTER G. OPERATION OF DEPARTMENT TURNPIKE PROJECTS

43 TAC §27.80, §27.81

The Texas Department of Transportation (department) adopts new §27.80, concerning definitions, and §27.81, concerning free use of turnpike projects by military vehicles. New §27.81 is adopted with changes to the proposed text as published in the December 3, 2004 issue of the *Texas Register* (29 TexReg 11335). New §27.80 is adopted without changes to the proposed text as published in the December 3, 2004 issue of the *Texas Register* (29 TexReg 11335) and will not be republished.

EXPLANATION OF ADOPTED NEW SECTIONS

Transportation Code, §362.901, requires the Texas Transportation Commission (commission) to adopt rules to allow a military vehicle to use a turnpike without payment of a toll or fare.

New §27.80 defines the turnpike projects and vehicles for which free use applies.

New §27.81 defines the procedures that must be implemented by the department to provide free use of turnpike projects. Free use will be granted at all toll locations. It may not be possible to grant free passage in some lanes equipped only with an automated coin machine and traffic control gates; however, all currently envisioned toll locations will have at least one manual or electronic toll collection lane that can accommodate free passage. The adopted new section describes the methods for granting free use in each lane type. In some cases, manual logs must be kept for accounting purposes. The adopted new section provides that free passage by military vehicles may not be provided on a particular turnpike project to the extent a trust agreement or indenture governing the project that is in existence as of the effective date of these sections prohibits providing free passage. Subsequent state law cannot overrule the provisions of such a trust agreement or indenture as to do so would be an unconstitutional impairment of the contract with the bondholders.

COMMENTS

No comments were received on the proposed new sections. However, to eliminate redundancy, §27.81(b) is adopted with changes to reword "coin machine lanes" to "coin machines".

STATUTORY AUTHORITY

The new sections are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §326.901, which requires the commission to adopt rules to allow a military vehicle to use turnpike projects without payment of a toll or fare.

CROSS REFERENCE TO STATUTE: Transportation Code, §362.901.

§27.81. Free Use Of Turnpike Project By Military Vehicles.

(a) Purpose. Transportation Code, §362.901, requires the commission to adopt rules to allow a military vehicle to use turnpike projects without payment of a toll or fare. This section describes the policies implementing §362.901.

(b) General. Except as provided in subsection (h) of this section, the department will allow free use of turnpike projects by military vehicles in convoy and individually. Military vehicles will be allowed free use in all lanes except where it would be unsafe or impractical to do so, such as lanes equipped with automatic coin machines and gates.

(c) Electronic toll collection (ETC) lanes. The department prefers that military vehicles use ETC lanes. Military vehicles will not

be required to carry transponders or be registered with a toll customer service center in order to obtain free passage.

(d) Staffed toll lanes. Military vehicles may use staffed toll lanes. For accounting purposes, individual drivers may be required to sign a log sheet or take other actions as directed by the toll collector. One or more vehicles in a convoy may be required to sign a log sheet or take other actions as directed otherwise by the toll collector.

(e) Automatic coin machine (ACM) lanes. ACM lanes are often equipped with traffic control gates and cannot practically accommodate free passage. ETC or staffed lanes should be used instead of ACM lanes. In the event a military vehicle inadvertently enters an ACM lane, toll road staff will attempt, when safe and practical to do so, to raise the gate and allow free passage.

(f) Automated enforcement. The department will develop procedures so that military vehicle images recorded by automated violation enforcement systems, if any, will be rejected and violation notices will not be issued.

(g) Records. The department may maintain records of free passage of military vehicles on its turnpike projects for audit, reconciliation, and reporting purposes.

(h) Exception. To the extent of any inconsistency with the requirements of this subchapter, the provision of free passage for military vehicles on turnpike projects that are governed by a trust agreement or indenture in existence on the effective date of this subchapter shall be governed by the terms of that trust agreement or indenture.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 28, 2005.

TRD-200500395
Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: February 17, 2005
Proposal publication date: December 3, 2004
For further information, please call: (512) 463-8630

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

General Land Office

Title 31, Part 1

In accordance with Section 2001.039 Government Code, the Texas General Land Office (GLO) submits the following Notice of Intent to Review the rules found in 31 TAC, Part 1, Chapter 20 relating to Natural Resources Damage Assessment.

Review of the rules under this chapter will determine whether the reasons for adoption of the rules continue to exist. During the review process, the GLO may also determine that a specific rule may need to be amended to further refine the directives and goals of the GLO, that no changes to a rule as currently in effect are necessary, or that a rule is no longer valid or applicable. Rules will also be combined or reduced for simplification and clarity when feasible. Readopted rules will be noted in the *Texas Register's* Rules Review section without publication of the text. Any proposed amendments or repeal of a rule or chapter as a result of the review will be published in the Proposed Rules section of the *Texas Register* and will be open for an additional 30-day public comment period prior to final adoption or repeal.

The GLO invites suggestions from the public during the review process and will address any comments received. Any questions or comments should be directed to Mr. Walter Talley, General Land Office, 1700 North Congress, Room 626, Austin, Texas, 78701-1495, (512) 305-9129 within 30 days of publication.

TRD-200500422
Trace Finley
Policy Director
General Land Office
Filed: January 31, 2005

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School Land Board

Title 31, Part 4

In accordance with Section 2001.039 Government Code, the School Land Board (SLB) submits the following Notice of Intent to Review the rules found in 31 TAC Part 4, Chapter 155 relating to Land Resources. Review of the rules under this chapter will determine whether the reasons for adoption of the rules continue to exist. During the review process, the Board may also determine that a specific rule may need to be amended to further refine the directives and goals of the Board, that no changes to a rule as currently in effect are necessary or that a rule is no longer valid or applicable. Rules may also be combined or reduced for simplification and clarity when feasible. Readopted rules will be noted in the *Texas Register's* Rules Review section without publication of the text. Any proposed amendments or repeal of a rule or chapter as a result of the review will be published in the Proposed Rules section of the *Texas Register* and will be open for an additional 30-day public comment prior to final adoption or repeal.

The review of Chapter 155 is filed in accordance with the General Land Office's Rule Review Plan published in the October 15, 2004, issue of the *Texas Register* (29 TexReg 9697). The SLB invites suggestions from the public during the review process and will address any comments received. Any questions or comments should be directed to Walter Talley, *Texas Register* Liaison, Texas General Land Office, P.O. Box 12873, Austin, TX 78711, facsimile number (512) 463-6311 or email to walter.talley@glo.state.tx.us. Written comments must be received no later than thirty (30) days from the date of publication of this notice.

TRD-200500426
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
School Land Board
Filed: January 31, 2005

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Adopted Rule Reviews

Texas Commission on Environmental Quality

Title 30, Part 1

The Texas Commission on Environmental Quality (commission) adopts the rules review of Chapter 325, Certificates of Competency, *without changes*, in accordance with Texas Government Code, §2001.039, which requires state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the reasons for the rules continue to exist. The notice of intention to review was published in the August 27, 2004 issue of the *Texas Register* (29 TexReg 8386).

In a separate rulemaking, published in this issue, the commission adopts the repeal of Chapter 325.

CHAPTER SUMMARY

Chapter 325 provides for certificates of competency for public water supply operators and companies, including types of certificates, renewal provisions, and reciprocity with other states' certificates.

ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission conducted a review and determined that the reasons for the rules in Chapter 325 do not continue to exist. House Bill 3111, 77th Legislature, 2001, created new Texas Water Code, Chapter 37, to consolidate the administrative requirements for licensing and registration programs administered by the commission. In 2001, the commission repealed most of Chapter 325 and adopted new 30 TAC Chapter 30, Occupational Licenses and Registrations. Chapter 30 contains all the licensing and registration requirements for the occupational programs administered by the Compliance Support Division. Subchapters A and B are the remaining subchapters in Chapter 325 that will be repealed.

A rulemaking concurrent to this quadrennial review repeals Chapter 325 (Rule Project Number 2004-045-325-WT).

PUBLIC COMMENT

The public comment period closed on September 27, 2004, and no comments were received.

TRD-200500378
Stephanie Bergeron Perdue
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: January 28, 2005

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Texas Youth Commission

Title 37, Part 3

In accordance with the General Appropriation Act, Article IX, §167, 75th Legislature, the Texas Youth Commission is adopting the review of Title 37, Part 3, Chapter 111, concerning Contracts, Chapter 117, concerning Interstate Compact on Juveniles, and Chapter 119, concerning Agreements with other Agencies. The proposed rule review was published in the December 3, 2004, issue of the *Texas Register* (29 TexReg 11393).

The Commission has determined that the reasons for adopting the rules contained in these chapters continue to exist.

No public comments were received regarding this review.

TRD-200500372
Dwight Harris
Executive Director
Texas Youth Commission
Filed: January 26, 2005

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IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas State Affordable Housing Corporation

Notice of Requests for Proposals

Notice is hereby given of Requests for Proposals by TSAHC to multifamily developers for the rehabilitation or demolition/reconstruction of affordable multifamily housing complexes in Arlington, Corpus Christi and El Paso, financed by private activity bonds (to be issued by TSAHC) and low income housing tax credits (to be issued by the Texas Department of Housing and Community Affairs). Proposals will be due at the TSAHC offices in Austin by 2:00 p.m. on Monday, March 28, 2005. The Cities have set forth specific criteria for the multifamily housing complexes in the Requests for Proposals, which can be viewed on TSAHC's Web site (www.tsahc.org) in the Multifamily Bond Programs section. Any questions about the Requests for Proposals must be E-mailed or faxed to Katherine Closmann at kclosmann@tsahc.org or 512-477-3557. All questions and responses will be posted on TSAHC's web site.

TRD-200500488
David Long
President
Texas State Affordable Housing Corporation
Filed: February 2, 2005

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Department of Assistive and Rehabilitative Services

Notice of Request for Proposals

The Department of Assistive and Rehabilitative Services (DARS), Division for Deaf and Hard of Hearing Services (DHHS) is requesting proposals for new grant awards to begin in Fiscal Year 2005 for HHSC Regions 1, 3, 6 and 11 for projects under the Regional Specialist Program. The Specialist, under the Regional Specialist Program projects, will function as a single point of contact within the service area for all state and local service providers and organizations as well as for persons who are deaf and hard of hearing for the purpose of facilitating services. Additionally, the Specialist will be the primary contact person involved in planning of services to persons who are deaf and hard of hearing at the regional level.

Note to Applicants: The estimated funding levels in this notice do not bind DHHS to make awards or to any specific number of awards or funding levels. Awards are contingent on available funding.

Eligible Applicants: Parties eligible to apply for grants under this program are public or private agencies and organizations, including for-profit agencies and organizations, and institutions of higher education. Preference will be given to the entities that maintain an office with staff that affords a point of contact on a continuing basis.

Contact: Parties interested in submitting a proposal should contact the Division for Deaf and Hard of Hearing Services, P.O. Box 12904, Austin, Texas 78711, 512-407-3250 (Voice) or 512-407-3251 (TTY) or by email at doug.dittfurth@dars.state.tx.us, to obtain a complete copy of the RFP. The RFP is also available for pick-up at 4900 North Lamar, Suite 2169, Austin, Texas 78751, during normal business hours. The RFP is not available through fax. The RFP may be available on the agency website at http://www.dars.state.tx.us/business/grants.shtml

Closing Date: Proposals must be received in the Consumer Procurement Services Office, 4800 North Lamar, Suite 360, Austin, Texas 78756 no later than 5 p.m. on March 11, 2005. Proposals received after this time and date will not be considered.

Award Procedure: All proposals will be subject to evaluation by a review team using a scoring method based on the evaluation criteria set forth in the RFP. The review team will determine which proposals best meet the established criteria and will make selection recommendations for each priority to the Assistant Commissioner. Any applicant may be asked to clarify any information in their proposal, which may involve either written or oral presentations of requested information. The initial grant awards could start as early as April 1, 2005.

DHHS reserves the right to accept or reject any or all proposals submitted. DHHS is under no legal or other obligation to execute a grant on the basis of this notice or the distribution of a RFP. Neither this notice nor the RFP commits DHHS to pay for any costs incurred prior to the award of a grant.

TRD-200500420
Sylvia F. Hardman
Deputy Commissioner for Legal Services
Department of Assistive and Rehabilitative Services
Filed: January 31, 2005

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Texas Building and Procurement Commission

Request for Proposal

RFP Number: #303-5-10673

Opening Date/Time: March 4, 2005 at 3:00 PM

Description: Lease requirement for approximately 15,059 sq. ft. of Office Space in the City of Huntsville, Walker County, Texas

Agency: Texas Department of Criminal Justice (TDCJ)

Purchaser/Contact: Kenneth Ming (512) 463-2743 or through the Electronic State Business Daily at:

http://esbd.tbpc.state.tx.us/1380/bid_show.cfm?bidid=57385

TRD-200500409
Mark Gentle
Legal Counsel
Texas Building and Procurement Commission
Filed: January 28, 2005

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Request for Proposal

RFP Number: #303-5-10648

Opening Date/Time: April 1, 2005 at 3:00 PM

Description: Lease requirement for approximately 4,568 sq. ft. of Office Space in Lake Worth, Tarrant County, Texas

Agency: Department of Public Safety (DPS)

Purchaser/Contact: Kenneth Ming (512) 463-2743 or through the Electronic State Business Daily at:

http://esbd.tbpc.state.tx.us/1380/bid_show.cfm?bidid=57422

TRD-200500442
Mark Gentle
Legal Counsel
Texas Building and Procurement Commission
Filed: January 31, 2005

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Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of **January 21, 2005 through January 27, 2005**. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for these activities extends 30 days from the date published on the Coastal Coordination Council web site. The notice was published on the web site on **February 2, 2005**. The public comment period for these projects will close at 5:00 p.m. on **March 4, 2005**.

FEDERAL AGENCY ACTIONS:

Applicant: Robert and Kathy Van Landingham

Location: The project is located at 114 and 116 Perch Street in a canal subdivision in Rockport, Aransas County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Rockport, Texas. Approximate UTM Coordinates: Zone 14; Easting: 685965; Northing: 3106375.

Project Description: The applicant proposes to construct an approximately 120-foot-long bulkhead in a residential canal subdivision and to backfill a 3,000-square-foot area (with approximately 470 yds^3) of canal behind it. A 5-foot-long by 50-foot-long residential pier will be constructed adjacent and parallel to the bulkhead.

CCC Project No.: 05-0109-F1

Type of Application: U.S.A.C.E. permit application **#23559** is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344).

Note: The consistency review for this project may be conducted by the **Texas Commission on Environmental Quality** under §401 of the Clean Water Act.

Applicant: National Energy Group, Inc

Location: The project site is located in Sabine Lake, in Texas State Mineral Lease 102334, in State Tract (ST) Number 4, just west of the Texas-Louisiana border, in Orange County, Texas. Well No. 1 can be located on the U.S.G.S. quadrangle map entitled: West of Greens Bayou, Texas-Louisiana. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 422039; Northing: 3314331. The associated flow lines will traverse ST's 4 and 8 in Sabine Lake.

Project Description: The applicant proposes to install, operate, and maintain structures and equipment necessary for oil and gas drilling, production, and transportation activities for ST-4, Well No. 1. Such activities include installation of typical marine barges and keyways, shell and gravel pads, production structures with attendant facilities, and flowlines. Plans indicate that approximately 2667 cubic yards of crushed shell or gravel would be placed on the lake bottom to support the drilling structure. Flowlines will be installed by jetting and/or trenching and will be buried 3 feet below the mud line. Water depth at the proposed project location is approximately -7 feet. Upon cessation of drilling and gathering activities, the applicant will remove all structures and attendant features.

CCC Project No.: 05-0119-F1

Type of Application: U.S.A.C.E. permit application **#23634** is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344).

Note: The consistency review for this project may be conducted by the **Texas Railroad Commission** under §401 of the Clean Water Act.

Applicant: Corpus Christi LNG, L.P. and Cheniere Corpus Christi Pipeline Company

Location: The proposed liquefied natural gas (LNG) terminal site is located in Corpus Christi Bay and on a tract of land on the north shore of Corpus Christi Bay, adjacent to the La Quinta Turning Basin, in Nueces and San Patricio Counties, Texas. The site can be located on the U.S.G.S. quadrangle map entitled: "Gregory, Texas." Approximate UTM Coordinates in NAD 27 (meters): Zone 14; Easting: 670250; Northing: 3085500. The proposed 23-mile-long natural gas pipeline would extend from the LNG terminal site, cross under US Route 181, continue northwest, pass south of the community of Taft, cross Chiltipin Creek, and terminate north of Sinton, in San Patricio County, Texas. The proposed natural gas pipeline route can be located on the U.S.G.S. quadrangle map entitled: "Taft, Texas."

Project Description: The applicants propose to construct and operate a new LNG import, storage, and vaporization terminal and to construct and operate a new, approximately 23-mile long, 48-inch diameter, natural gas pipeline with two 30-inch-diameter lateral pipelines, totaling 1,350 feet in length, that would transfer the imported natural gas to markets throughout Texas and the U.S. via interconnections with existing intrastate and interstate pipeline systems.

The LNG terminal would be built west of an existing alumina plant, on mostly industrial land that was formerly used for bauxite ore storage and disposal of processed bauxite residue. The LNG terminal would include a new marine basin with berths for LNG transport ships and for tug and line-handling boats, and a ship maneuvering area. Construction of the LNG terminal would require about 772 acres, including about 458 acres onshore for dredged material placement areas (DMPA's) and about 78 acres of shallow bay habitat that would be dredged to construct the marine basin. The new marine basin would be about 1,300 feet by 3,170 feet at its widest point. Two LNG docks would be capable of unloading approximately 300 ships per year. Each LNG dock would be a pile-supported, one-level, reinforced concrete beam and slab structure approximately 90 feet wide by 116 feet long. Each of the two LNG ship berths would have four breasting and six mooring structures. Access bridges would be provided to connect the breasting dolphins to the docks and to the mooring dolphins. A separate berthing area would be constructed for tug and line-handling boats used for the

maneuvering and berthing of LNG ships. Hydraulic and/or mechanical dredging of the marine basin to a maximum depth of -45.0 feet mean low tide (MLT), plus 2 feet of allowable overdepth, would remove approximately 4,650,000 cubic yards (yds^3) of material composed of mostly virgin stiff clays with interbedded sand and silty layers. The northern banks of each berth and the western end of the tug berth area would be protected against erosion by articulated block mat revetment (1,550 Linear Feet x 24 LF, or 37,300 sq. ft.), steel sheet pile bulkhead (700 LF), and rock riprap breakwaters (3,100 LF x 29 FT3/LF, or 3,300 yds^3). New-work dredged material will be placed in DMPA1 and DMPA2, located at the terminal site and formerly used for the disposal of processed bauxite residue and related waste from refining activities at the adjacent alumina plant. DMPA 1, an 81-acre area comprised of Bed 22 (45 acres), Bed 24 (28 acres) and the "V-ditch" (8 acres), would first be filled and capped with approximately 10 percent of the dredged material, 500,000 to 1,200,000 cubic yds., which would be primarily dredged mechanically. The remaining 90 percent of the dredged material, 3,200,000 to 3,900,000 yds^3, would be dredged hydraulically and placed in DMPA 2, a 385-acre area. The filling and capping of Beds 22 and 24 of DMPA1 would be part of a Texas Risk Reduction Program (TRRP) closure plan due to concentrations of arsenic in the groundwater at the Bed 22 area that exceed applicable risk-based standards. Maintenance dredging of the LNG berths would be conducted on an as-needed basis, most likely in conjunction with USACE dredging of the La Quinta Channel. Based on shoaling rates projected for the federal channel, 25,000 to 40,000 cubic yds./year of shoaling could be expected. Maintenance dredged material would be placed in DMPA2.

LNG would be pumped from ships through two 30-inch LNG transfer pipelines to three land-based LNG storage tanks at the terminal. The LNG transfer pipelines would range in length from approximately 4,300 to 6,200 feet. The transfer pipelines would be placed on aboveground structural pipe racks constructed of reinforced concrete columns and steel cross members. The LNG storage tanks would be designed to store a nominal volume of 160,000 cubic meters (1,006,400 barrels) of LNG at a temperature of -270°F. A low earthen dike would surround each LNG storage tank to form the required impounding area sized to contain 110 percent of the volume of the tank. Nine in-tank pumps (three in each LNG storage tank) would deliver LNG to the highpressure sendout pumps via the boil-off gas (BOG) condenser. LNG sendout pumps would deliver LNG from the BOG condenser to each LNG vaporizer. The terminal would use single-burner submerged combustion vaporizer (SCV) units, which would use vaporized LNG for fuel. The initial source of water to be used in the SCV would be trucked into the facility. Once in operation, the SCVs would generate excess water as part of the combustion process. Each SCV has a sodium carbonate injection system to neutralize the slightly acidic water, and would produce approximately 19 gallons/minute (gpm) of fresh water at full capacity. Given that there are 15 SCVs (one reserve unit), up to 285 gpm could be produced by the facility. The SCV water would be held in a holding basin (up to 20,000 gallons) that would be located approximately 300 feet northeast of the vaporizer area. The water from the SCVs would be held up to one hour prior to being pumped into the existing raw water lake. The applicants expect that Sherwin Alumina Company would be able to utilize the full amount of SCV water produced as a result of the terminal operations. However, when the raw water lake is full, excess water would be discharged off the project site via the LNG Plant stormwater drainage system. This ditch would empty into the La Quinta Road Drainage Ditch on the west side of La Quinta Road and eventually into Corpus Christi Bay. Discharges from the vaporization facility would have a temperature of approximately 60°F and would be treated with caustic soda to neutralize or mitigate the carbonic acid present in the SCV water and raise the pH to 6.0-8.0 prior to discharge. This water would contain dissolved sodium carbonate produced through this reaction, which would increase the total dissolved solids, thus increasing the measured salinity of the discharge water over that of the untreated water. The discharge would not contain any chlorides.

The Project would be served by utilities from the public electric power system via overhead power lines operating at 138 kV. These public supply lines would be extended to the Project site, where a new substation would be installed outside the facility fence line. Potable water would be supplied to the Project by connecting to an existing line at the intersection of SH 35 and SH 361. The current water system at this location at times is low on pressure and capacity; therefore, sufficient pumping and storage tanks would be added to the potable water system to maintain pressure and capacity. The existing La Quinta Road would provide primary access to the LNG storage and vaporization site during construction and operation. An existing dirt road would be improved to provide access to the proposed administration building. A new asphalt road would be constructed parallel to the LNG transfer pipe trestle, connecting the process area to the docks. Support facilities located within the terminal would include buildings for administration, warehousing and maintenance, electrical, customs, and security.

The proposed natural gas pipeline facilities would consist of approximately 23 miles of 48-inch-diameter highpressure pipeline, extending underground from the proposed LNG terminal to north of Sinton, Texas, with two new 30-inch-diameter lateral pipelines to connect with the Channel Pipeline Company and the Florida Gas Transmission Company meter stations. The lateral pipeline to the Channel Pipeline Company would be about 950 feet long, and would branch out from the main pipeline at MP 14.6. The lateral pipeline to the Florida Gas Transmission Company would be about 400 feet long, and would branch out from the main pipeline at MP 16.5. Most of the route would cross agricultural land, following existing easements such as roads and other pipelines. Five access roads would be constructed or improved in association with the pipeline. All of the roads would be 25 feet wide, and combined would total about 4.7 miles in length. Construction of the proposed pipeline and related facilities would disturb about 406 acres, including the construction rights-of-way for the 48-inch-diameter main pipeline and 30-inch-diameter lateral pipelines, additional temporary workspaces, contractor and pipe yards, metering stations/interconnects, pig launchers and receivers, and access roads. The proposed 48-inch-diameter pipeline would cross two perennial streams, Chiltipin Creek and Oliver Creek, and eight intermittent-flowing waterbodies. The applicants propose to cross a canal at MP 10.1 by boring underneath the waterbody. All other waterbodies, including Chiltipin Creek, Oliver Creek, three intermittent stream tributaries to Chiltipin Creek, an irrigation canal, and 3 drainage ditches, would be crossed by the open cut method that would involve trenching directly across the waterbody.

IMPACTS TO AQUATIC HABITATS: Construction of the LNG terminal would temporarily impact 0.69 acre of primarily shoalgrass (Halodule wrightii) seagrass beds, 0.42 acre of black mangrove (Avicennia germinans), 0.38 acre of smooth cordgrass (Spartina alterniflora), 0.49 acre of tidal flats sparsely vegetated (<30%) with glasswort (Salicornia spp.) and saltwort (Batis maritima), and 0.22 acre of nonvegetated tidal flats, totaling 2.20 acres. These temporarily impacted areas would be disturbed during construction, but once construction was complete, the areas would be restored to preconstruction contours and allowed to revegetate naturally.

Construction and operation of the LNG terminal would permanently impact 5.35 acres of seagrass, 1.59 acres of mangroves, 2.38 acres of smooth cordgrass, 1.13 acres of vegetated tidal flats, and 0.23 acres of non-vegetated tidal flats, for a total of 10.68 acres. In addition to direct

impacts on seagrass beds within the proposed dredged footprint, adjacent seagrass beds could potentially be affected by turbidity and sedimentation created by dredging activity. It is expected that any turbidity or sedimentation impacts would be limited to within several hundred feet of dredging operations. Minimizing suspension of sediments during dredging may reduce negative impacts to seagrasses.

Eight palustrine emergent wetlands were identified within the proposed construction impact area of the natural gas pipeline. The pipeline project would temporarily impact approximately 1.356 acres of wetlands. The entire pipeline right-of-way would be restored to pre-construction contours following construction.

COMPENSATORY MITIGATION PLAN: The applicant proposes to mitigate for the temporary and permanent loss of wetlands by creating and preserving wetlands at Shamrock Island. The island is located along the eastern shoreline of Corpus Christi Bay, approximately 2 miles west of Mustang Island. The island serves as an important rookery to a number of nesting bird species, in particular, the royal tern. The applicant's mitigation plan (Attachment 1) is to construct breakwaters to create sheltered areas of potential submerged aquatic vegetation (SAV) (seagrass) habitat and to preserve existing SAV habitat, marsh, tidal flats, and uplands by reducing erosion of those areas. Additionally, the breakwaters would provide submerged hard substrate.

CCC Project No.: 05-0120-F1

Type of Application: U.S.A.C.E. permit application **#23561** is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344).

Note: The consistency review for this project may be conducted by the **Texas Railroad Commission** under §401 of the Clean Water Act.

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451 - 1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above may be obtained from Gwen Spriggs, Council Administrative Coordinator, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or gwen.spriggs@glo.state.tx.us. Comments should be sent to Ms. Spriggs at the above address or by fax at (512) 475-0680.

TRD-200500443
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: February 1, 2005

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in Sections 303.003 and 303.009, Tex. Fin. Code.

The weekly ceiling as prescribed by Sections 303.003 and 303.009 for the period of 02/07/05 - 02/13/05 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit thru $250,000.

The weekly ceiling as prescribed by Sections 303.003 and 303.009 for the period of 02/07/05 - 02/13/05 is 18% for Commercial over $250,000.

[1] Credit for personal, family or household use.

[2] Credit for business, commercial, investment or other similar purpose.

TRD-200500441
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: January 31, 2005

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Office of Court Administration

Invitation for Offers

REFERENCE #212-5-0237

CLASS #918-06

The purpose of this Invitation for Offers is to solicit offers to develop performance measures for two new public defender offices being established in Bexar and Hidalgo counties through grant funds provided by the Task Force on Indigent Defense (Task Force), to provide an evaluation of each program's progress in meeting those measures, and to provide technical assistance to each program. The consultant will also provide technical assistance and consultation related to the delivery of indigent defense services and systems as requested by the Task Force.

The contract will begin upon the issuance of a purchase by OCA and terminate upon acceptance of deliverables, but shall in no event extend beyond August 31, 2008.

The deadline for submitting a response for this procurement is at 3:00 p.m. March 14, 2005. Responses submitted shall be valid for thirty (30) days.

To receive a copy of the Invitation for Offers, contact:

Mr. James Bethke Task Force on Indigent Defense 205 West 14th Street, Suite 700 Austin, TX 78701 Phone: 512/936-6994 FAX: 512/475-3450 E-mail: jim.bethke@courts.state.tx.us

Prospective offerors should submit questions by email to Jim Bethke. All questions and answers will be posted on the Task Force's website at www.courts.state.tx.us/tfid. Potential bidders are responsible for checking the posting to review the questions and answers.

TRD-200500485
James Bethke
Director, Task Force on Indigent Defense
Office of Court Administration
Filed: February 2, 2005

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Texas Council for Developmental Disabilities

Request for Proposal

The Texas Council for Developmental Disabilities (TCDD) announces the availability of funds to establish one Accessible Housing project. This project will use either the EasyLiving Homecm or a similar program that addresses the expected outcomes and meets the intent of the Request for Proposal (RFP) to promote construction of first level accessible (visitable) homes, and fits the unique characteristics of Texas including the significant cultural and geographic differences. The project will also build a broad coalition of public and private organizations who will work together to increase the number of visitable new homes built throughout the state. TCDD expects the grantee to create a voluntary certification process that recognizes and certifies builders in the state who build first level accessible homes. The project will also include

an advertising-marketing component as an incentive to builders who include these features in their new home construction.

Funding of up to $200,000 per year for up to three years is available for this project. TCDD reserves the right to evaluate project activities and to award funding for an additional two years (years four and five) if successful. Funds are awarded on an annual basis with continuation funding evaluated yearly. Non-federal matching funds of at least 10% of total project costs are required for projects in federally designated poverty areas. Non-federal matching funds of at least 25% of total project costs are required for projects in other areas.

Additional information concerning this request for proposal or more information about TCDD may be obtained through TCDD's web site at http://www.txddc.state.tx.us. All questions pertaining to this RFP should be directed to Sharon Pratscher, Planning Specialist at (512) 437-5412 (voice), (512) 437-5431 (TDD), or e-mail Sharon.Pratscher@tcdd.state.tx.us.

The application packet may be obtained on TCDD's web site or request a copy in writing by U.S. mail, fax or e-mail, from Barbara Booker at the Texas Council for Developmental Disabilities, 6201 East Oltorf Street, Suite 600, Austin, Texas 78741-7509; fax number (512) 437-5434; e-mail address Barbara.Booker@tcdd.state.tx.us. **Applications must be requested in writing unless downloaded from the Internet.**

Deadline: Two hard copies, one with the original signatures, must be submitted. **All proposals must be received by TCDD not later than 4:00 PM, Central Standard Time, April 8, 2005, or, if mailed, postmarked prior to midnight on the date specified above.** Proposals may be delivered by hand or mailed to TCDD's physical office at 6201 East Oltorf, Suite 600, Austin, Texas 78741-7509. Faxed proposals cannot be accepted.

TCDD also requests that applicants send an electronic copy at the same time the hard copies are submitted. Electronic copies should be addressed to Barbara.Booker@tcdd.state.tx.us.

Proposals will not be accepted after the due date.

Grant Proposers' Workshops: The Texas Council for Developmental Disabilities will conduct at least one workshop to help potential applicants understand the grant application process. In addition, answers to frequently asked questions will be posted on the web site. For more information on the Grant Proposers' Workshops and the scheduled locations, see our web site at http://www.txddc.state.tx.us.

TRD-200500375
Roger Webb
Executive Director
Texas Council for Developmental Disabilities
Filed: January 26, 2005

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Texas Education Agency

Request for Early Reading Diagnostic Instruments

Description. The Texas Education Agency is notifying publishers that early reading diagnostic instruments for Kindergarten, Grade 1, and Grade 2 may be submitted for review. Texas Education Code (TEC), §28.006, authorizes the commissioner of education to develop recommendations for school districts to administer early reading instruments to diagnose student reading skill and comprehension development.

Under TEC, §28.006(b), the commissioner of education shall adopt a list of early reading instruments that school districts may use to diagnose reading skill and comprehension development. Reading instruments placed on the list must be based on scientific research, evaluate individual student reading progress and be used to determine students at risk for dyslexia or other reading difficulties. The list of reading instruments adopted under TEC, §28.006(b), must also provide for diagnosing the reading development and comprehension of students participating in a program under TEC, Chapter 29, Subchapter B (relating to bilingual education and special language programs).

Program Requirements. Since the 1998 - 1999 school year, school districts have been required to administer early reading instruments. Results from the early reading instruments are used to inform instruction and place students at risk for reading difficulties, including dyslexia, in Accelerated Reading Instruction intervention programs. Results from these early reading instruments must be reported to the commissioner of education, the local school board and the parent and/or guardian of students tested. The list of early reading instruments will be made available so that school districts and charter schools may order instruments for the 2005 - 2006 school year. The 2003 - 2004 list of instruments adopted by the commissioner in 2003 will remain in effect through both the 2004 - 2005 and the 2005 - 2006 school years. Once an instrument is selected for the commissioner's list, it will remain on the list for three years unless the approved test is no longer available from the publisher, or the publisher decides to submit an updated version of the instrument. Under these circumstances, the instrument must be resubmitted for review.

Publishers of early reading instruments that were selected for the 2003 - 2004 *Commissioner's List of Early Reading Instruments* do not need to resubmit tests that are currently on the list unless they want a new version of that instrument to be considered by the review panel of reading experts; however, they will be required to resubmit tests in 2006.

Due to continued budgetary limitations, a $5 per student per year cost cap remains on each complete Test Option on the 2005 - 2006 *Commissioner's List of Early Reading Instruments*. For example, if Option G requires two instruments in order to assess all required domains at a grade level, then the combination of those two instruments will be state funded at no more than $5 per student. For the 2005 - 2006 school year, school districts and open-enrollment charter schools will purchase early reading instruments directly from the publisher/vendor unless the test is published by the Texas Education Agency. If the cost of the Test Option exceeds the $5 per student limit established, the state will reimburse the school district or open-enrollment charter school at the limit established. The school district or open-enrollment charter school is responsible for the remainder of the cost of the Test Option.

Selection Criteria. Publishers will be responsible for submitting tests that they wish to be reviewed for consideration for inclusion on the 2005 - 2006 *Commissioner's List of Early Reading Instruments*. All tests submitted for review must be based on scientific research and must submit evidence of reliability and validity for assessing key reading domains and for identifying children at risk of reading failure, including the identification of children with dyslexia. Submitted evidence must demonstrate that the test meets the state criteria for reliability and validity. Instruments will be evaluated in terms of validity, reliability, cost-effectiveness and ease of administration/implementation by the classroom teacher. Consideration will also be given to the number of domains covered by the test and the number of additional tests that would need to be purchased by schools in order to cover all required domains. Reading instruments (English and Spanish) submitted for review must address at least one of the following five domains: (1) phonological awareness; (2) graphophonemic knowledge; (3) word reading; (4) oral reading accuracy; and (5) comprehension of text, as appropriate for Kindergarten, Grade 1, and Grade 2. Tests submitted for use by Reading First schools may also assess vocabulary and fluency. As in previous years, it may be necessary to use a combination of instruments to form a Test Option to assess all required domains. The

criteria used to select instruments for the 2005 - 2006 school year is available through the Division of Curriculum--Statewide Initiatives at the Texas Education Agency, (512) 463-9581.

Proposals must be submitted to Dr. Linda Limón, Director, Texas Reading Initiatives, 3-121D, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701 by 5:00 p.m. (Central Time), Monday, March 7, 2005, to be considered for inclusion on the 2005 - 2006 *Commissioner's List of Early Reading Instruments*.

TRD-200500470
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: February 2, 2005

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Request for Grade 3 Early Reading Diagnostic Instruments for *List of Grade 3 Early Reading Instruments* for the 2005 - 2006 School Year

Description. The Texas Education Agency is notifying publishers that early reading diagnostic instruments for the *List of Grade 3 Early Reading Instruments* may be submitted for review. P.L. 107-110, Title I, Part B, Subpart 1 of the Elementary and Secondary Education Act, as amended by the No Child Left Behind Act of 2001, CFDA #84.357, authorizes the commissioner of education to develop recommendations for school districts to administer early reading instruments to diagnose student reading skill and comprehension development.

Under P.L. 107-110, Title I, Part B, Subpart 1 of the Elementary and Secondary Education Act, as amended by the No Child Left Behind Act of 2001, CFDA #84.357, the Texas Education Agency shall adopt a list of Grade 3 early reading instruments that districts and charters may use to diagnose reading skill and comprehension development. Reading instruments placed on the list must be based on scientific research, evaluate individual student reading progress and be used to determine students at risk for dyslexia or other reading difficulties. The list of reading instruments must also provide for diagnosing the reading development and comprehension of students participating in a program under Texas Education Code, Chapter 29, Subchapter B (relating to bilingual education and special language programs).

Program Requirements. Since May 2003, some district/charter schools have been required to administer Grade 3 early reading instruments. The list of early reading instruments will be made available so that school districts and charter schools may order instruments for the 2005 - 2006 school year. Once an instrument is selected for the *List of Grade 3 Early Reading Instruments*, it will remain on the list for three years unless the publisher decides to submit an updated version of the instrument. For example, the 2004 - 2005 *List of Grade 3 Early Reading Instruments* will remain in effect through both the 2005 - 2006 and the 2006 - 2007 school years. The instrument must then be resubmitted to undergo the review process.

Selection Criteria. Publishers will be responsible for submitting tests that they wish to be reviewed for consideration for inclusion on the 2005 - 2006 *List of Grade 3 Early Reading Instruments*. All tests submitted for review must be based on scientific research and must meet the state criteria for reliability and validity.

Publishers of instruments currently on the 2004 - 2005 *List of Grade 3 Early Reading Instruments* need not reapply unless their instruments have been revised and they want the new edition of that instrument to be considered for inclusion on the 2005 - 2006 *List of Grade 3 Early Reading Instruments*. Other publishers will be responsible for submitting tests that they wish to be reviewed for consideration for inclusion on the 2005 - 2006 *List of Grade 3 Early Reading Instruments* . All tests submitted for review must be based on scientific research and must submit evidence of reliability and validity for assessing key reading domains and for identifying children at risk of reading difficulties, including dyslexia. Instruments will be evaluated in terms of validity, reliability, cost-effectiveness and ease of administration/implementation by the classroom teacher. Reading instruments (English and Spanish) submitted for review must address at least one of the following five domains: (1) phonological awareness; (2) graphophonemic knowledge; (3) word reading; (4) oral reading accuracy; and (5) comprehension of text, as appropriate for Grade 3. As in previous years, it may be necessary to use a combination of instruments to form a Test Option to assess all required domains.

Proposals must be submitted to Dr. Jana Bland, Director of Texas Reading First, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701 by 5:00 p.m. (Central Time), Monday, March 7, 2005, to be considered for inclusion on the *List of Grade 3 Early Reading Instruments*.

TRD-200500469
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: February 2, 2005

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Request for Reading Assessments for Progress Monitoring in Kindergarten, Grade 1, Grade 2, and Grade 3 for the 2005 - 2006 School Year

Description. The Texas Education Agency is notifying publishers that reading progress monitoring assessments may be submitted for review for the *List of Recommended Reading Assessments for Progress Monitoring in Kindergarten, Grade 1, Grade 2, and Grade 3*. P.L. 107-110, Title I, Part B, Subpart 1 of the Elementary and Secondary Education Act, as amended by the No Child Left Behind Act of 2001, CFDA #84.357, authorizes the Texas Education Agency to develop a list of recommended assessments to measure growth and development of reading skills of students who are at risk of reading difficulties, including dyslexia, through immediate direct systematic instructional intervention to strengthen reading skills and comprehension throughout the school year.

The reading progress monitoring instruments that will be placed on the list must be based on scientific research, evaluate individual student reading progress and be used to identify students at risk for dyslexia or other reading difficulties. The recommended list of reading progress monitoring assessments must also provide evaluation of the reading skill and comprehension development of students participating in programs under Texas Education Code, Chapter 29, Subchapter B (relating to bilingual education and special language programs).

Program Requirements. The 2005 - 2006 *List of Recommended Reading Assessments for Progress Monitoring in Kindergarten, Grade 1, Grade 2, and Grade 3* will remain in effect through both the 2006 - 2007 and the 2007 - 2008 school years. Once an instrument is selected for the *List of Recommended Reading Assessments for Progress Monitoring in Kindergarten, Grade 1, Grade 2, and Grade 3*, it will remain on the list for three years unless the publisher decides to submit an updated version of the instrument. The instrument must then be resubmitted to undergo the review process.

Publishers of progress monitoring instruments that were selected for the 2004 - 2005 *List of Recommended Reading Assessments for Progress Monitoring in Kindergarten, Grade 1, Grade 2, and Grade 3*

do not need to resubmit items that are currently on the list unless they want a new version of that instrument to be considered by the review panel of reading experts.

Selection Criteria. Publishers will be responsible for submitting tests that they wish to be reviewed for consideration for inclusion on the 2005 - 2006 *List of Recommended Reading Assessments for Progress Monitoring in Kindergarten, Grade 1, Grade 2, and Grade 3.* All tests submitted for review must be based on scientific research and must meet the state criteria for reliability and validity. Publishers of instruments currently on the 2004 - 2005 *List of Recommended Reading Assessments for Progress Monitoring in Kindergarten, Grade 1, Grade 2, and Grade 3* need not reapply unless their instruments have been revised and they want the new edition of that instrument to be considered for inclusion on the 2005 - 2006 list. Other publishers desiring to be included on the list will be evaluated in terms of validity, reliability, cost-effectiveness and ease of administration/implementation by the classroom teacher. Reading instruments (English and Spanish) submitted for review must address all of the following five core components of early reading instruction: (1) phonological/phonemic awareness; (2) phonics/word recognition; (3) fluency; (4) text comprehension, and (5) vocabulary, as appropriate for Kindergarten, Grade 1, Grade 2 and Grade 3.

Proposals must be submitted to Dr. Jana Bland, Director of Texas Reading First, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701 by 5:00 p.m. (Central Time), Monday, March 7, 2005, to be considered for inclusion on the *List of Recommended Reading Assessments for Progress Monitoring in Kindergarten, Grade 1, Grade 2, and Grade 3*.

TRD-200500471
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: February 2, 2005

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Texas Commission on Environmental Quality

Enforcement Orders

A default order was entered regarding Frank Henderson dba Temple Tire Transport, Docket No. 2002-0421-MSW-E on January 28, 2005 assessing $11,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting David Speaker, Staff Attorney at (512) 239-2548, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Brownsville Navigation District, Docket No. 2002-0221-MWD-E on January 18, 2005 assessing $20,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lindsay Andrus, Staff Attorney at (512) 239-4761, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Malone, Docket No. 2003-1382-MWD-E on January 18, 2005 assessing $14,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Erika Fair, Enforcement Coordinator at (512) 239-6673, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Go-Crete, Docket No. 2003-1395-PST-E on January 18, 2005 assessing $8,400 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Gitanjali Yadav, Staff Attorney at (512) 239-2029, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Mohammed Adil Aqil dba Two Way Quick Stop, Docket No. 2002-1154-PST-E on January 18, 2005 assessing $15,225 in administrative penalties with $14,625 deferred.

Information concerning any aspect of this order may be obtained by contacting Benjamin DeLeon, Staff Attorney at (512) 239-6939, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Shanil-Tex, Inc. dba Alex's Mobil, Docket No. 2003-0856-PST-E on January 18, 2005 assessing $2,400 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jim Biggins, Staff Attorney at (210) 403-4017, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jeff Green, Docket No. 2003-0551-PST-E on January 18, 2005 assessing $1,800 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Sarah Utley, Staff Attorney at (210) 490-3096, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Bonham, Docket No. 2003-0312-MLM-E on January 18, 2005 assessing $3,933 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kent Heath, Enforcement Coordinator at (512) 239-4575, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Martindale Water Supply Corporation, Docket No. 2003-1253-MLM-E on January 28, 2005 assessing $1,001 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Sarah Utley, Staff Attorney at (210) 490-3096, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Detroit, Docket No. 2003-0332-MWD-E on January 18, 2005 assessing $8,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Carolyn Lind, Enforcement Coordinator at (903) 535-5145, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Department of Transportation, Docket No. 2002-0492-PST-E on January 18, 2005 assessing $7,500 in administrative penalties with $1,500 deferred.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator at (713) 767-3607, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Duke Energy Field Services, L.P., Docket No. 2003-1094-AIR-E on January 18, 2005 assessing $2,350 in administrative penalties with $470 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Mohammad Ali Kheraj dba Value Food Store, Docket No. 2003-0375-PST-E on January 18, 2005 assessing $11,550 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Barbara Watson, Staff Attorney at (512) 239-2044, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Terry L. Babb, Sr. dba Twin Oaks Mobile Home Park, Docket No. 2003-1328-PWS-E on January 28, 2005 assessing $4,550 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lindsay Andrus, Staff Attorney at (512) 239-4761, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Tideport Petroleum, Inc., Docket No. 2003-0163-PST-E on January 18, 2005 assessing $1,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Benjamin DeLeon, Staff Attorney at (512) 239-6939, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding James Patrick Kral, Docket No. 2003-0480-OSI-E on January 18, 2005 assessing $750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Sarah Utley, Staff Attorney at (210) 490-3096, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding SET Environmental, Inc., Docket No. 2003-1548-IWD-E on January 18, 2005 assessing $1,800 in administrative penalties with $360 deferred.

Information concerning any aspect of this order may be obtained by contacting Christina McLaughlin, Enforcement Coordinator at (512) 239-6589, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding North Texas Municipal Water District, Docket No. 2004-0137-AIR-E on January 18, 2005 assessing $1,395 in administrative penalties with $279 deferred.

Information concerning any aspect of this order may be obtained by contacting Sheila Smith, Enforcement Coordinator at (512) 239-1670, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding PWT Enterprises, Inc. dba King Kleen Car Wash, Docket No. 2004-0190-IWD-E on January 28, 2005 assessing $6,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Catherine Albrecht, Enforcement Coordinator at (713) 767-3672, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Murphy Oil USA, Inc., Docket No. 2004-0218-EAQ-E on January 18, 2005 assessing $750 in administrative penalties with $150 deferred.

Information concerning any aspect of this order may be obtained by contacting Joseph Daley, Enforcement Coordinator at (512) 239-3308, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Steve Eugene Fontenot, Sr., Docket No. 2004-0260-OSI-E on January 18, 2005 assessing $250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Barbara Watson, Staff Attorney at (512) 239-2044, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Cliff Jackson Chambers, Docket No. 2004-0261-OSI-E on January 18, 2005 assessing $250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Barbara Watson, Staff Attorney at (512) 239-2044, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Centex Dairy, L.L.C., Docket No. 2004-0339-AGR-E on January 18, 2005 assessing $810 in administrative penalties with $162 deferred.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (817) 588-5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding C & I Oil Company, Inc, Docket No. 2004-0366-PST-E on January 18, 2005 assessing $500 in administrative penalties with $100 deferred.

Information concerning any aspect of this order may be obtained by contacting Leila Pezeshki, Enforcement Coordinator at (210) 403-4080, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding William R. Coffey dba Moody Water System, Docket No. 2004-0368-PWS-E on January 18, 2005 assessing $5,700 in administrative penalties with $1,140 deferred.

Information concerning any aspect of this order may be obtained by contacting Sherry Smith, Enforcement Coordinator at (512) 239-0572, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding The Goodyear Tire & Rubber Company, Docket No. 2004-0393-AIR-E on January 18, 2005 assessing $3,300 in administrative penalties with $660 deferred.

Information concerning any aspect of this order may be obtained by contacting Suzanne Walrath, Enforcement Coordinator at (512) 239-2134, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Sabre Communications Corporation, Docket No. 2004-0559-AIR-E on January 18, 2005 assessing $770 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lori Thompson, Enforcement Coordinator at (903) 535-5116, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of San Saba, Docket No. 2004-0649-MSW-E on January 18, 2005 assessing $1,020 in administrative penalties with $204 deferred.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator at (512) 239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Meridian, Docket No. 2004-0666-PWS-E on January 18, 2005 assessing $735 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Cari Bing, Enforcement Coordinator at (512) 239-1445, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding The George R. Brown Partnership, L.P., Docket No. 2004-0683-AIR-E on January 18, 2005 assessing $28,050 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Ronnie Kramer, Enforcement Coordinator at (806) 468-0512, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Rio Grande Regional Hospital, Inc., Docket No. 2004-0737-PST-E on January 18, 2005 assessing $5,520 in administrative penalties with $1,104 deferred.

Information concerning any aspect of this order may be obtained by contacting Mike Meyer, Enforcement Coordinator at (512) 239-4492, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Douglas Utility Company, Docket No. 2004-0783-MWD-E on January 18, 2005 assessing $6,080 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Catherine Albrecht, Enforcement Coordinator at (713) 767-3672, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding William C. Miller, Docket No. 2004-0851-OSI-E on January 18, 2005 assessing $250 in administrative penalties with $50 deferred.

Information concerning any aspect of this order may be obtained by contacting Brent Hurta, Enforcement Coordinator at (512) 239-6589, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Pharr, Docket No. 2004-0819-MLM-E on January 18, 2005 assessing $3,600 in administrative penalties with $720 deferred.

Information concerning any aspect of this order may be obtained by contacting Jaime Garza, Enforcement Coordinator at (956) 430-6030, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200500465

LaDonna Castañuela

Chief Clerk

Texas Commission on Environmental Quality

Filed: February 2, 2005

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Notice of District Petition

Notice mailed January 28, 2005.

Texas Commission on Environmental Quality (TCEQ) Internal Control No. 11122004-D03; The Lyman S. Reed Family Limited Partnership (Petitioner) filed a petition for creation of Galveston County Municipal Utility District No. 52 (District) with the TCEQ. The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states the following: (1) the Petitioner is the owner of a majority in value of the land to be included in the proposed District; (2) there are no lien holders on the property to be included in the proposed District; (3) the proposed District will contain approximately 277.49 acres located within Galveston County, Texas; and (4) the proposed District is within the corporate boundaries of the City of Texas City, Texas, and no portion of land within the proposed District is within the corporate limits or extraterritorial jurisdiction of any other city, town or village in Texas. By Resolution No. 04-98, effective August 4, 2004, the City of League City, Texas gave its consent to the creation of the proposed District. The petition further states that the proposed District will: (1) purchase, construct, acquire, maintain and operate a waterworks and sanitary sewer system for residential and commercial purposes; (2) construct, acquire, improve, extend, maintain and operate works, improvements, facilities, plants, equipment and appliances helpful or necessary to provide more adequate drainage for the property in the proposed District; and (3) control, abate and amend local storm waters or other harmful excesses of water, as more particularly described in an engineer's report filed simultaneously with the filing of the petition. According to the petition, the Petitioners have conducted a preliminary investigation to determine the cost of the project, and from the information available at the time, the cost of the project is estimated to be approximately $16,500,000.

INFORMATION SECTION

The TCEQ may grant a contested case hearing on a petition if a written hearing request is filed within 30 days after the newspaper publication of the notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing;" (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed district's boundaries. You may also submit your proposed adjustments to the petition which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided below.

The Executive Director may approve a petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of the notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court.

Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, the same address. For additional information, individual members of the general public may contact the Office of Public Assistance, at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us.

TRD-200500463

LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 2, 2005

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission in accordance with Texas Water Code (TWC), §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **March 11, 2005**. The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate a proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on March 11, 2005**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, comments on the DOs should be submitted to the commission in **writing**.

(1) COMPANY: Frank Chmielowski dba Panchos Country Store; DOCKET NUMBER: 2003- 1041-PST-E; TCEQ ID NUMBERS: 39301 and RN101432060; LOCATION: three miles north of Highway 107, Edinburgh, Hidalgo County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks; PENALTY: $3,150; STAFF ATTORNEY: Jeffrey Huhn, Litigation Division, MC 175, (512) 239-5111; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(2) COMPANY: Leroy Kirbie, Jr.; DOCKET NUMBER: 2003-1574-OSI-E; TCEQ ID NUMBERS: OS8528 and RN103387023; LOCATION: 1340 Oakridge Road, Azle, Tarrant County, Texas; TYPE OF FACILITY: on-site septic facility (OSSF) installer; RULES VIOLATED: 30 TAC §30.5(a) and §285.50(e) and Texas Health and Safety Code (THSC), §366.071(c), by failing to possess a current site evaluator's license at the time he conducted preconstruction site evaluations, including visiting the site and performing a soil analysis, a site survey, or other activities necessary to determine the suitability of the site for an OSSF; and 30 TAC §30.5(b), by failing to possess a site evaluator's license prior to advertising or representing to the public that he could perform preconstruction OSSF site evaluation services; PENALTY: $500; STAFF ATTORNEY: Barbara Klein, Litigation Division, MC 175, (512) 239-1320; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: Shawn Horvath dba Aero Valley Water Service; DOCKET NUMBER: 2002- 0867-PWS-E; TCEQ ID NUMBERS: 0610243, 11401, and RN101198331; LOCATION: 950 Airport Road, Roanoke, Denton County, Texas; TYPE OF FACILITY: public water supply system; RULES VIOLATED: 30 TAC §290.109(c) and §290.122(c) and THSC, §341.033(d), by failing to collect and analyze at least one water sample per month for bacteriological analysis and to provide public notification for sampling deficiency; 30 TAC §290.121, by failing to develop and maintain a chemical and microbiological monitoring plan; 30 TAC §290.45(b)(1)(C)(ii) and THSC, §341.0315(c), by failing to provide a minimum total storage capacity of 200 gallons per connection; 30 TAC §290.45(b)(1)(C)(iii) and THSC, §341.0315(c), by failing to provide a minimum of two service pumps with a minimum pumping capacity of 2.0 gallons per minute per connection; 30 TAC §290.45(b)(1)(C)(iv) and THSC, §341.0315(c), by failing to provide a minimum pressure tank capacity of 20 gallons per minute per connection; 30 TAC §290.39(e), by failing to submit planning material; 30 TAC §290.42(e)(3), by failing to provide mechanical chlorination equipment so that continuous and effective disinfection can be secured under all conditions; 30 TAC §290.110(b)(4), by failing to maintain a minimum of 0.2 milligrams per liter free chlorine residual throughout the distribution system; 30 TAC §290.110(d)(3), by failing to possess a chlorine test kit which uses the diethyl-P-phenylenediamine method to determine the chlorine residual; 30 TAC §290.110(c)(5)(A), by failing to perform chlorine residual tests at least once every seven days; 30 TAC §290.46(h), by failing to maintain on hand a supply of calcium hypochlorite disinfectant; 30 TAC §290.41(c)(3)(O) and §290.43(e), by failing to enclose all facilities in an intruder-resistant fence; 30 TAC §290.44(d)(4), by failing to provide accurate metering devices at each service connection to provide water usage data; 30 TAC §290.46(m)(l)(B), by failing to adopt an adequate plumbing ordinance, regulations, or a service agreement with provisions for proper enforcement to ensure that neither cross connections nor unacceptable plumbing practices are permitted; 30 TAC §290.46(j), by failing to complete a customer service inspection certification prior to providing continuous water service to new construction, on any existing service when the water purveyor has reason to believe that cross- connection or other unacceptable plumbing practices exist, or after any material improvement, correction, or addition to the private plumbing facilities; 30 TAC §290.46(f), by failing to maintain operating records; 30 TAC §290.44(h), by failing to establish a cross-connection control program; 30 TAC §290.46(1), by failing to flush all dead-end mains monthly or more frequently to maintain water quality; 30 TAC §290.46(n)(2), by failing to prepare and maintain an accurate and up-to-date map of the distribution system; 30 TAC §290.46(t), by failing to post a legible sign of the system's ownership at the facility; 30 TAC §290.46(e)(1) and THSC, §341.033, by failing to have the system under the direct supervision of an adequately certified operator; 30 TAC §290.43(c)(1) - (4); by failing to design, fabricate, erect, test, and disinfect all facilities for potable water storage in strict accordance with current American Water Works Association standards; 30 TAC §290.43(d)(2), by failing to provide all pressure tanks with pressure release devices and to provide the pressure tanks with an easily readable pressure gauge; 30 TAC §290.46(m)(1)(A), by failing to inspect the ground storage tank annually; 30 TAC §290.46(m)(1)(B), by failing to inspect the pressure

tanks annually; 30 TAC §290.41(c)(3)(K), by failing to seal the wellhead with the use of gaskets or sealing compound and to provide the well with a screened casing vent; 30 TAC §290.41(c)(3)(M), by failing to provide a suitable sampling tap on the well discharge line; 30 TAC §290.41(c)(3)(N), by failing to install a flow meter on the well pump discharge line; 30 TAC §290.42(i), by failing to provide American National Standards Institute/National Sanitation Foundation certification for all chemicals used in treatment of water supplied; 30 TAC §290.46(m), by failing to initiate a maintenance program to ensure the good working condition and appearance of the system's facilities and equipment; 30 TAC §290.43(d)(3) and THSC, §341.036, by failing to equip all air compressor injection lines for pressure tanks with a filter or other device to prevent compressor lubricants and other contaminants from entering the pressure tank; 30 TAC §290.41(c)(3)(B), by failing to provide a well casing 18 inches above the elevation of the finished floor of the pump house or natural ground surface; 30 TAC §290.46(r), by failing to operate a water distribution system to provide a minimum pressure of 35 pounds per square inch throughout the distribution system; and 30 TAC §290.109(c)(3)(A)(i) and §290.122(c), by failing to collect the appropriate number of repeat bacteriological samples and to provide public notification of the sampling deficiency; PENALTY: $19,400; STAFF ATTORNEY: David Speaker, Litigation Division, MC 175, (512) 239-2548; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-200500468
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: February 2, 2005

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Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **March 11, 2005**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on March 11, 2005**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO should be submitted to the commission in **writing**.

(1) COMPANY: 2 M Vest, Inc. dba Mason Fast Stop; DOCKET NUMBER: 2003-0322-PST- E; TCEQ ID NUMBERS: 0075313 and RN102821535; LOCATION: 2950 South Mason Road, Katy, Fort Bend County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases from the operation of petroleum underground storage tanks (USTs); 30 TAC §334.8(c)(4)(B) and TWC, §26.346(a), by failing to submit a UST registration and self-certification form to the TCEQ; and 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available a valid, current TCEQ delivery certificate before delivery of a regulated substance into the UST system; PENALTY: $600; STAFF ATTORNEY: Rebecca Nash Petty, Litigation Division, MC 175, (512) 239-3693; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2) COMPANY: A. Schulman, Inc.; DOCKET NUMBER: 2003-0156-IWD-E; TCEQ ID NUMBERS: 003377-000 and RN101518533; LOCATION: Thomas Street east of Farm-to-Market Road 105, Orange, Orange County, Texas; TYPE OF FACILITY: carbon black distribution plant with a wastewater treatment facility; RULES VIOLATED: 30 TAC §305.125(1), TCEQ Permit Number 003377-000, Effluent Limitations and Monitoring Requirements Numbers 1 and 2, and TWC, §26.121(a), by failing to comply with the permitted effluent limits; PENALTY: $21,723; STAFF ATTORNEY: Gitanjali Yadav, Litigation Division, MC 175, (512) 239-2029; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(3) COMPANY: AGA Enterprises, Inc.; DOCKET NUMBER: 2003-1188-PST-E; TCEQ ID NUMBERS: 54159 and RN102041571; LOCATION: 7120 Interstate Highway 10, Orange, Orange County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.7(d)(3), by failing to amend, update, or change registration information; 30 TAC §334.50(b)(1)(A), (b)(2)(A), and (b)(2)(A)(i)(III), and TWC, §26.3475(c), by failing to monitor the UST system for releases at least once per month, by failing to conduct the annual performance and operation reliability test on the line leak detector, and by failing to monitor the UST piping for possible releases; 30 TAC §115.245(2) and Texas Health and Safety Code (THSC), §382.085(b), by failing to successfully complete the annual pressure decay test for the Stage II vapor recovery equipment installed at the station; 30 TAC §115.246(4) and (5) and THSC, §382.085(b), by failing to maintain Stage II training records at the station; 30 TAC §334.8(c)(5)(A)(iii), by failing to ensure a valid delivery certificate is posted at the station and is visible at all times; 30 TAC §§115.222(3), 115.242(4), and 334.72(2)(A), and THSC, §382.085(b), by failing to detect a gasoline leak in the plus line underneath the dispenser on pump number three; 30 TAC §115.244(3) and THSC, §382.085(b), by failing to conduct monthly inspections of the Stage II vapor recovery system; 30 TAC §115.242(3)(J) and THSC, §382.085(b), by failing to repair inoperative Stage I dry break on the unleaded tank; and 30 TAC §334.50(d)(1)(B)(ii), by failing to reconcile inventory control records at least once every month sufficiently accurate to detect a release which equals or exceeds the sum of 1.0% of the total substance flowthrough for the month plus 130 gallons; PENALTY: $13,000; STAFF ATTORNEY: Benjamin Joseph de Leon, Litigation Division, MC 175, (512) 239-6939; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(4) COMPANY: BASF Fina Petrochemicals LP; DOCKET NUMBER: 2003-1317-AIR-E; TCEQ ID NUMBER: JE-0843-F; LOCATION: 2700 Highway 366, Port Arthur, Jefferson County, Texas; TYPE OF FACILITY: petrochemical plant; RULES VIOLATED: 30 TAC §101.211(a)(1)(E) and (b)(6), and THSC, §382.085(b), by failing to include the expected and actual times of scheduled startup activities at the ethylene unit on the initial and final notifications for the startup period; 30 TAC §101.20(3) and §116.115(b)(2)(G) and (c), Permit Numbers 36644/PSD-TX-903/ 007, Special Condition 1, and THSC, §382.085(b), by failing to comply with the permitted limit of 5.23 pounds per hour for volatile organic compounds (VOCs) from the ground flare; THSC, §382.085(a), by failing to prevent unauthorized releases of VOC and hydrogen sulfide (H_2S) emissions from the emergency bypass vent; 30 TAC §101.201(a)(1)(A) and (B), and THSC, §382.085(b), by failing to report emissions events within 24 hours of discovery of the events and failing to determine if the emissions events were reportable and submit notification to the regional office within 24 hours after discovery; 30 TAC §101.20(3), §116.115(b)(2)(G) and (c), Permit Numbers 36644/PSD-TX-903/N 007, Special Condition 1, and THSC, §382.085(b), by failing to comply with the permitted limits for nitrogen oxides (NO_x) and carbon monoxide (CO); 30 TAC §101.201(a)(2)(G) and (H), and THSC, §382.085(b), by failing to include the types of compounds and estimated total quantities for those compounds on the notification for the emissions; 30 TAC §101.201(a)(2)(H) and (b)(4) and (8), and THSC, §382.085(b), by failing to include authorized emissions limits for compounds listed on the initial notifications and failing to include the agency-established facility identification number, preconstruction authorization number or rule governing the facility involved in the emissions event, and the authorized emission limits on the final notifications for the emissions; 30 TAC §101.20(3), §116.115(c), and Permit Numbers 36644/PSD-TX-903/ 007, Special Condition 1, 23, and 23A, by failing to maintain the appropriate equipment so as to minimize fugitive VOC emissions from the cooling tower and failing to repair leaks within 45 calendar days of discovery and failing to comply with the permitted limits for VOC and benzene emissions; 30 TAC §101.201(b)(4), (7), and (8), and THSC, §382.085(b), by failing to include the types of compounds and estimated total quantities for NO_x and CO on the final report notifications and failing to include the facility identification number; 30 TAC §§101.20(3), 111.111(a)(4)(A), and 116.115(b)(2)(G) and (c), Permit Numbers 36644/PSD-TX-903/ 007, Special Condition 1, 13C, and 20, and THSC, §382.085(b), by failing to maintain compliance with visible emission limitations for gas flares and failing to maintain compliance with opacity limitations; 30 TAC §101.201(c), and THSC, §382.085(b), by failing to submit final reports within 14 days of an emissions event; 30 TAC §101.211(b) and (c), and THSC, §382.085(b), by failing to submit the final maintenance notifications within 14 days of the emissions events; PENALTY: $1,944,600; STAFF ATTORNEY: Paul Sarahan, Litigation Division, MC 175, (512) 239-3423; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(5) COMPANY: Deer Creek Ranch, Inc. dba Deer Creek Water Co.; DOCKET NUMBER: 2002-0773-PWS-E; TCEQ ID NUMBERS: 2270049 and RN100822527; LOCATION: east of Ranch-to-Market Road 3238 and 6.5 miles south of State Highway 71, Travis County, Texas; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.118 and THSC, §341.031(a), by failing to provide water that meets the commission's secondary constituent levels for iron, chloride, sulfate, and total dissolved solids; 30 TAC §290.46(f)(2), by failing to maintain documentation of annual tank inspections for the ground storage tank and pressure tank; 30 TAC §290.46(f)(3)(E)(iv), by failing to maintain copies of customer service inspections for at least ten years; 30 TAC §290.46(n)(2), by failing to provide an accurate and up-to-date map of the distribution system; 30 TAC §290.43(c)(3), by failing to modify the overflow pipe flap valve assembly on the ground storage tank to provide no more than a 1/16-inch gap; 30 TAC §290.110(d)(3)(C)(i), by failing to use an approved method for measuring the free chlorine residual; 30 TAC §290.43(e), by failing to provide an intruder-resistant fence; 30 TAC §290.45(b)(1)(C)(i), by failing to provide a minimum well capacity of 0.6 gallons per minute per service connection; 30 TAC §290.46(u), by failing to plug abandoned public water supply wells owned by the facility; and 30 TAC §290.46(e)(4)(A), by failing to operate the facility under the direct supervision of a competent water works operator holding a class D or higher operator's certificate; PENALTY: $13,110; STAFF ATTORNEY: Lindsay Andrus, Litigation Division, MC 175, (512) 239-4761; REGIONAL OFFICE: Austin Regional Office, 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

TRD-200500467
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: February 2, 2005

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Notice of Water Quality Applications

The following notices were issued during the period of January 25, 2005 through February 1, 2005.

The following require the applicants to publish notice in the newspaper. The public comment period, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THIS NOTICE.

BECKER UTILITY CORPORATION has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014565001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 420,000 gallons per day. The facility is located east of Talley Road approximately 3.8 miles north of Potranco Road (Farm-to-Market Road 1957) and approximately 3.1 miles south of Culebra Road (Farm-to-Market Road 471) in Northwest Bexar County, Bexar County, Texas.

BILL BRILEY has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014547001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 12,000 gallons per day. The facility will be located on the east side of Highway 56 approximately 3 miles north of the intersection of Highway 56 and Highway 377 in Glen Rose in Somervell County, Texas.

CITY OF CLUTE has applied for a major amendment to TPDES Permit No. 10044-001 to remove effluent limitations and monitoring requirements for total copper and total zinc. The facility is located approximately 800 feet east of the intersection of Lake Jackson Road and State Highway 288 on the north side of the Missouri Pacific Railroad in the City of Clute in Brazoria County, Texas.

DUCK HAVEN, LTD. has applied for a renewal of TPDES Permit No. 14287-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 100,000 gallons per day. The facility is located 3.5 miles southeast of the City of Wellborn along Farm-to-Market Road 2154 in Brazos County, Texas.

CITY OF GARLAND which operates the City of Garland Municipal Separate Storm Sewer System (MS4), has applied for a renewal

of NPDES Permit No. TXS001001, which authorizes storm water point source discharges to surface water in the state from the City of Garland MS4. The permit will be renewed as TPDES Permit No. WQ0004682000. The MS4 is located within the corporate boundary of City of Garland, in Collin, Dallas, and Rockwall Counties, Texas

CITY OF HALLETTSVILLE has applied for a renewal of TPDES Permit No. 10013-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 800,000 gallons per day. The facility is located on the bank of the Lavaca River, approximately 1,000 feet downstream from the U.S. Highways 90-A and 77 bridge across the Lavaca River in the City of Hallettsville in Lavaca County, Texas.

HANSON PIPE & PRODUCTS, INC. which operates a facility that manufactures concrete products, has applied for a renewal of TPDES Permit No. WQ0003361000, which authorizes the discharge of process wastewater, utility wastewater, hydrostatic test water, and storm water on an intermittent and flow variable basis via Outfall 001. The facility is located at the intersection of Coletoville Road No. 1 and U.S. Highway 59, approximately five miles southwest of the City of Victoria, Victoria County, Texas.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 166 has applied for a minor amendment to the Texas Pollutant Discharge Elimination System (TPDES) permit to authorize an additional interim phase at a daily average flow not to exceed 500,000 gallons per day. The existing permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 675,000 gallons per day. The facility is located 16,300 West Little York Road, approximately 3,000 feet west of the intersection of State Highway 6 and West Little York Road in Harris County, Texas.

CITY OF KENDLETON has applied for a renewal of TPDES Permit No. 10996-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 80,000 gallons per day. The facility is located approximately 1,500 feet east of the intersection of Farm-to-Market Road 2219 and U.S. Highway 59, and 1,000 feet south of U.S. Highway 59 in Fort Bend County, Texas.

CITY OF NATALIA has applied for a renewal of TPDES Permit No. 11806-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 260,000 gallons per day. The facility is located approximately 1,200 feet southwest of the City of Natalia on the west side of 6th Street in Medina County, Texas.

QUAIL VALLEY UTILITY DISTRICT has applied for a renewal of TPDES Permit No. WQ0011046001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 4,000,000 gallons per day. The facility is located at 2939 Blue Lakes Lane, approximately 600 feet south of the terminus of Nancy Belle Lane, at the confluence of Stafford Run and Oyster Creek in Missouri City in Fort Bend County, Texas.

SAN ANTONIO RIVER AUTHORITY has applied for a renewal of TPDES Permit No. 14042-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 150,000 gallons per day. The facility is located approximately 0.35 miles south on Loop 1604 from the intersection of Interstate Highway 10 and Loop 1604, 600 feet west of Loop 1604 in Bexar County, Texas.

SAN ANTONIO WATER SYSTEM has applied for a renewal of TPDES Permit No. 10137-004, which authorizes intermittent discharges from Mitchell Lake. Mitchell Lake has been removed from the City of San Antonio wastewater treatment system, but because it was once used as a wastewater treatment pond, discharges from Mitchell Lake are regulated. The facility is located approximately one mile south of Loop 410 and east of Pleasanton Road, south of the City of San Antonio in Bexar County, Texas.

CITY OF SMILEY has applied for a renewal of TPDES Permit No. 10574-002, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 42,000 gallons per day. The facility is located approximately 1,250 feet west of Farm-to-Market Road 108 and 4,200 feet northwest of the intersection of U.S. Highway 87 and Farm-to-Market Road 108 in Gonzales County, Texas.

SPENCER ROAD PUBLIC UTILITY DISTRICT has applied for a renewal of TPDES Permit No. 11472-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 980,000 gallons per day. The facility is located at 14310 Spencer Road (Farm-to-Market Road 529), approximately 2,000 feet west of the intersection of Jackrabbit Road and Spencer Road, approximately 1.1 miles east of the intersection of State Highway 6 and Spencer Road, adjacent to the east bank of Horsepen Creek in Harris County, Texas.

TRAVIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 4 has applied for a renewal of Permit No. 13206-001, which authorizes the disposal of treated domestic wastewater at a volume not to exceed a daily average flow of 720,000 gallons per day via irrigation of 298.7 acres of golf course. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal site are located approximately 5.5 miles southeast of the intersection of State Highway 71 and Farm-to-Market Road 2244 and 0.5 mile south of Barton Creek in Travis County, Texas.

CITY OF TROY has applied for a renewal of TPDES Permit No. 11263-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 309,000 gallons per day. The facility is located approximately 5,500 feet north of the center of the City of Troy and lying between Interstate Highway 35 and the Missouri, Kansas, and Texas Railroad in Bell County, Texas.

U.S. DEPARTMENT OF THE ARMY has applied for a renewal of Permit No. 12080-001, which authorizes the disposal of treated domestic wastewater at a volume not to exceed a daily average flow of 690,000 gallons per day via spray irrigation of 189.75 acres of adjacent grassland. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal site are located approximately 1,000 feet east of Military Highway and 0.5 mile southeast of the Headquarters Building at Camp Bullis in Bexar County, Texas.

V&M STAR, A PARTNERSHIP WITH GENERAL AND LIMITED PARTNERS, LP, which operates a tubular goods end finishing plant, has applied for a renewal of TPDES Permit No. WQ0003787000, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 23,000 gallons per day via Outfall 001, and process wastewater as blowdown from the cooling tower at a daily average flow not to exceed 8,000 gallons per day via Outfall 002. The facility is located at 8603 Sheldon Road, approximately 1.5 miles south of the intersection of Sheldon Road and U.S. Highway 90 in the City of Channelview, Harris County, Texas.

TRD-200500464
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 2, 2005

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Notice of Water Rights Application

Notice mailed January 28, 2005.

APPLICATION NO. 2006A; The Greater Texoma Utility Authority (GTUA) has applied for an amendment to its Water Use Permit No. 4301 (Application No. 2006) to change the use of all of the water authorized therein to municipal and industrial; to authorize an interbasin transfer of the water for diversion and use within the service areas of GTUA's customers in the adjoining Sabine River and Trinity River Basins; and to authorize the use of the bed and banks of West Prong of Sister Grove Creek and Sister Grove Creek to convey water from Lake Texoma to and through Lake Lavon for subsequent diversion by the North Texas Municipal Water District. Public meetings will be held in the basin of origin (Red River Basin) and each receiving basin (Sabine River Basin and Trinity River Basin). More information on the application and how to participate in the permitting process is given below. The application was received on April 19, 2004. Additional fees and information were received on June 15, 2004 and June 21, 2004. The Executive Director reviewed the application and determined it to be administratively complete and it was filed with the Chief Clerk of the Texas Commission on Environmental Quality (TCEQ) on June 29, 2004. The Executive Director has not completed a technical review of the application.

The TCEQ will hold public meetings to receive comments on the application for an amendment filed by the applicant, GTUA. The public meetings will consist of two parts, an Informal Discussion Period and a Formal Comment Period. During the Informal Discussion Period, the public is encouraged to ask questions of the applicant and TCEQ staff concerning the application, but comments made during the informal period will not be considered by the Commissioners before reaching a decision on the application and no formal response will be made. During the Formal Comment Period, members of the public may state their comments into the official record. The Executive Director will summarize the formal comments and prepare a written response. The written response will be considered by the Commissioners in their decision-making process and upon request will be available to the public. Public Meetings are to be held: (1) Monday, March 28, 2005 at 7:00 p.m., Grayson County Courthouse, Commissioner's Courtroom, 100 W. Houston, 1st Floor, Sherman, Texas 75090; (2) Tuesday, March 29, 2005 at 7:00 p.m., University Drive Court Facility, Central Jury Room, 1800 N. Graves, 1st Floor, McKinney, Texas 75069; and (3) Thursday, March 31, 2005 at 7:00 p.m., Hunt County Courthouse, Commissioner's Courtroom, 2500 Lee Street, 2nd Floor, Greenville, Texas 75401.

Citizens are encouraged to submit written comments anytime during the meetings or by mail before the meetings to the Office of the Chief Clerk, TCEQ, MC 105, P.O. Box 13087, Austin, Texas 78711-3087. If you need more information, please call the TCEQ Office of Public Assistance, toll free at 1-800-687-4040.

The full text of this notice issued on January 28, 2005 is available on the web at the following address: www.tceq.state.tx.us/comm_exec/cc/cc_db.html. When entering the permit number for the search, enter: WRPERM 4301

If you do not have access to the web and would like to obtain a full copy of the notice, please contact the Office of the Chief Clerk at the address indicated below or by calling (512) 239-3315.

The TCEQ may grant a contested case hearing on this application if a written hearing request is filed within 30 days from the date of newspaper publication of this notice.

INFORMATION SECTION

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any: (2) applicant's name and permit number; (3) the statement "[I/we] request a contested case hearing;" and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TCEQ Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us.

TRD-200500462
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 2, 2005

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Proposed Enforcement Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075, which requires that the commission may not approve these AOs unless the public has been provided an opportunity to submit written comments. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **March 14, 2005**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withhold approval of an AO if a comment discloses facts or considerations that indicate the proposed AO is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code, the Texas Health and Safety Code (THSC), and/or the Texas Clean Air Act (the Act). Additional notice is not required if changes to an AO are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on March 14, 2005**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that

comments on the AOs should be submitted to the commission in **writing**.

(1) COMPANY: Adan R. Ocampo dba Adam Auto Service; DOCKET NUMBER: 2004-1599-PST-E; IDENTIFIER: Petroleum Storage Tank (PST) Identification Number 62180, Regulated Entity Identification Number (RN) 101573566; LOCATION: Euless, Tarrant County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $2,910; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Cal Farley's Girlstown USA; DOCKET NUMBER: 2004-1165-PST-E; IDENTIFIER: PST Registration Number 69624, RN102343191; LOCATION: Whiteface, Cochran County, Texas; TYPE OF FACILITY: nonprofit home for girls; RULE VIOLATED: 30 TAC §334.50(d)(1)(B)(ii) and the Code, §26.3475(c), by failing to reconcile inventory control records; and 30 TAC §290.51(a)(3) and the Code, §5.702, by failing to pay a public health service fee for Fiscal Year 2003; PENALTY: $2,000; ENFORCEMENT COORDINATOR: David Van Soest, (512) 239-0468; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(3) COMPANY: Davis Iron Works Operations, Limited; DOCKET NUMBER: 2004-0479-PST-E; IDENTIFIER: PST Identification Number 37848, RN102370046; LOCATION: Hewitt, McLennan County, Texas; TYPE OF FACILITY: fleet refueling center; RULE VIOLATED: 30 TAC §334.50(a)(1)(A), (b)(1)(A) and (2)(B)(i)(I), (d)(1)(B)(ii) and (iii)(I), and the Code, §26.3475(a) and (c)(1), by failing to provide release detection and by failing to have each separate suction line tested; PENALTY: $3,200; ENFORCEMENT COORDINATOR: Lori Thompson, (903) 535-5100; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(4) COMPANY: Duke Energy Field Services, L.P.; DOCKET NUMBER: 2003-0176-AIR-E; IDENTIFIER: Air Account Number PE0051N, RN100226695; LOCATION: Fort Stockton, Pecos County, Texas; TYPE OF FACILITY: natural gas compressor station; RULE VIOLATED: 30 TAC §106.512(2)(C)(ii) and THSC, §382.085(b), by failing to maintain records of the quarterly testing requirement for oxides of nitrogen and carbon monoxide; PENALTY: $1,040; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5404, (915) 570-1359.

(5) COMPANY: Hobas Pipe USA, LP dba Hobas Pipe USA, Inc.; DOCKET NUMBER: 2004-1425-AIR-E; IDENTIFIER: Air Account Number HG1531T, Federal Operating Permit Number O-01015, RN102540812; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: plastic pipe manufacturing; RULE VIOLATED: 30 TAC §122.146(2) and THSC, §382.085(b), by failing to submit their annual compliance certification; 30 TAC §116.116(a)(1) and THSC, §382.085(b), by failing to represent the particulate matter omissions resulting from the calcium carbonate unloading activities; and 30 TAC §§122.121, 122.503(a)(1), and 122.516(a)(2), and THSC, §382.054, by failing to submit a Title V site operating permit; PENALTY: $11,312; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(6) COMPANY: Kinder Morgan Production Company LP; DOCKET NUMBER: 2004-0333-AIR-E; IDENTIFIER: Air Account Number SG0029C, RN102170966; LOCATION: Snyder, Scurry County, Texas; TYPE OF FACILITY: natural gas processing; RULE VIOLATED: 30 TAC §101.201(a)(1)(B) and THSC, §382.085(b), by failing to report 63 reportable emission events; 30 TAC §116.115(b)(2)(F) and §122.143(4), Federal Operating Permit Number 514, Permit 48978 Emission Sources Maximum Allowable Emission Rate Table, and THSC, §382.085(b), by failing to contain their emissions below the emission sources maximum allowable emission rates for permit number 48978; 30 TAC §122.145(2)(A) and (C), Operating Permit Number O-0220, and THSC, §382.085(b), by failing to report deviations; 30 TAC §116.115(c), Operating Permit Number O-0220, Voluntary Emissions Reduction Permit Number 48798, and THSC, §382.085(b), by failing to have pilot flare monitoring on flares and by failing to implement the diffusion fugitive monitoring program; and 30 TAC §106.512(2)(C)(iii), Operating Permit Number O-0220, and THSC, §382.085(b), by failing to permit initial emission testing of compressor engineer 6A; PENALTY: $259,258; ENFORCEMENT COORDINATOR: Craig Fleming, (512) 239-5806; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(7) COMPANY: Kraft Food Global, Inc.; DOCKET NUMBER: 2004-1166-AIR-E; IDENTIFIER: Air Account Number HG0478P, RN100214931; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: coffee processing; RULE VIOLATED: 30 TAC §101.359 and THSC, §382.085(b), by failing to submit the 2002 annual compliance report; and 30 TAC §101.352(b) and THSC, §382.085(b), by failing to hold a quantity of allowances in its compliance account; PENALTY: $1,664; ENFORCEMENT COORDINATOR: Kimberly Morales, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(8) COMPANY: Lower Colorado River Authority; DOCKET NUMBER: 2004-1494-EAQ-E; IDENTIFIER: Edwards Aquifer Protection Program Number 11-01121403, RN102769544; LOCATION: near Austin, Williamson County, Texas; TYPE OF FACILITY: construction project; RULE VIOLATED: 30 TAC §213.4(a)(1), (b)(2)(D), and (k), by failing to have approved modifications prior to commencing construction and by failing to comply with an approved Edwards Aquifer protection plan; PENALTY: $16,200; ENFORCEMENT COORDINATOR: Cari Bing, (512) 239-1445; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(9) COMPANY: Mex-Pak-U.S.A., Inc. dba Shop and Save Food Store; DOCKET NUMBER: 2004-1174-PST-E; IDENTIFIER: PST Facility Identification Number 57107, RN101790319; LOCATION: Laredo, Webb County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $2,400; ENFORCEMENT COORDINATOR: Chris Friesenhahn, (210) 490-3096; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(10) COMPANY: Dwain Modisette dba Mobile Tractor Repair; DOCKET NUMBER: 2004-1552-MSW-E; IDENTIFIER: RN104297957; LOCATION: Lufkin, Angelina County, Texas; TYPE OF FACILITY: tractor repair; RULE VIOLATED: 30 TAC §324.4 and THSC, §371.041, by failing to properly dispose of used oil; PENALTY: $150; ENFORCEMENT COORDINATOR: Mac Vilas, (512) 239-2557; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(11) COMPANY: Roger Beasley Imports, Inc. dba Mazda South; DOCKET NUMBER: 2004-1913-PST-E; IDENTIFIER: PST Facility Identification Number 51500, RN100676451; LOCATION: Austin, Travis County, Texas; TYPE OF FACILITY: retail sale of automobiles with repair and fueling; RULE VIOLATED: 30 TAC §37.815(a)

and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $1,050; ENFORCEMENT COORDINATOR: Howard Willoughby, (361) 825-3100; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(12) COMPANY: Tab Lonestar Holding Inc. dba Super Stop 14; DOCKET NUMBER: 2004-1923-PST-E; IDENTIFIER: PST Facility Identification Number 40091, RN102383064; LOCATION: Beaumont, Jefferson County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $950; ENFORCEMENT COORDINATOR: Daniel Siringi, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(13) COMPANY: City of Thrall; DOCKET NUMBER: 2004-0263-MLM-E; IDENTIFIER: Public Water Supply (PWS) Number 2460015, RN101388171; LOCATION: Thrall, Williamson County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(e)(3)(C), (f)(3)(A)(i), (i), (m)(1), (n)(2), and (v), by failing to obtain the services of a C groundwater licensed operator, by failing to document chlorine usage, by failing to adopt a plumbing ordinance or have service agreements, by failing to have annual tank inspection records, by failing to have a water system distribution map, and by failing to install the well's wiring in conduit; 30 TAC §288.20(a), by failing to have a drought contingency plan available; 30 TAC §290.44(h)(1)(A), by failing to have a backflow prevention device installed at the car wash; 30 TAC §290.110(d)(3), by failing to have a diethyl-p-phenylenediamine chlorine kit; and 30 TAC §290.43(c)(4), by failing to provide water level indicators for the storage tanks; PENALTY: $3,268; ENFORCEMENT COORDINATOR: Kent Heath, (512) 239-4575; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(14) COMPANY: Thomas Minaldi dba Timberlane Water System, Inc.; DOCKET NUMBER: 2004-0542-PWS-E; IDENTIFIER: PWS Number 2020054, RN101182624; LOCATION: Hemphill, Sabine County, Texas; TYPE OF FACILITY: surface water treatment; RULE VIOLATED: 30 TAC §290.109(c)(1)(A) and §290.110(b)(4) and (c), by failing to adequately chlorinate the water, monitor chlorine residuals, and take bacteriological samples in the distribution system; 30 TAC §290.43(c)(2), by failing to provide the 20,000-gallon ground storage tank with a roof access opening; and 30 TAC §290.45(b)(1)(B)(i) and (iv), by failing to meet the agency's minimum water system capacity requirements; PENALTY: $998; ENFORCEMENT COORDINATOR: Joseph Daley, (512) 239-3308; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(15) COMPANY: Transcontinental Gas Pipe Line Corporation; DOCKET NUMBER: 2004-0029-AIR-E; IDENTIFIER: Air Account Number WF0065A, RN100222728; LOCATION: El Campo, Wharton County, Texas; TYPE OF FACILITY: natural gas compressor station; RULE VIOLATED: 30 TAC §116.115(b)(2)(F) and (c), Permit Number 53758, and THSC, §382.085(b), by failing to demonstrate compliance with the applicable emission standards; PENALTY: $3,600; ENFORCEMENT COORDINATOR: Audra Ruble, (361) 825-3100; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(16) COMPANY: Valor Telecommunications of Texas, LP; DOCKET NUMBER: 2004-1668-PST-E; IDENTIFIER: PST Facility Identification Numbers 33489, 33496, 50145; RN101910990, RN101895522, RN101794477; LOCATION: Brownfield, Littlefield, and Lubbock; Terry, Lamb, and Lubbock Counties, Texas; TYPE OF FACILITY: telecommunication centers equipped with emergency generators with associated underground storage tanks (USTs); RULE VIOLATED: 30 TAC §334.8(c)(5)(A)(i) and (B)(ii), by failing to make available to a common carrier a valid, current delivery certificate and by failing to submit the UST registration and self-certification form; PENALTY: $3,700; ENFORCEMENT COORDINATOR: Ruben Soto, (512) 239-4571; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

TRD-200500445
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: February 1, 2005

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General Land Office

Notice of Approval of Coastal Boundary Survey

Pursuant to §33.136 of the Texas Natural Resources Code, notice is hereby given that Jerry Patterson, Commissioner of the General Land Office, approved a coastal boundary survey, submitted by Sidney Bouse, Licensed State Land surveyor, conducted November 12, 2004, locating the following shoreline boundary:

Survey in Brazoria County, a portion of the Texas Gulf Coast shoreline including portions of the Stephen F. Austin Survey 1/3 League, Abstract No. 28 and the John G. McNeel Survey, Abstract No. 335.

For a copy of this survey or more information on this matter, contact Ben Thomson, Director of the Survey Division, Texas General Land Office by phone at (512) 463-5212, e-mail ben.thomson@glo.state.tx.us, or fax (512) 463-5098.

TRD-200500419
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: January 31, 2005

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Texas Health and Human Services Commission

Notice of Intent to Amend Consulting Contract

The Health and Human Services Commission ("HHSC") currently contracts with International Biometric Group ("IBG") to provide independent evaluation and related services in the Front-End Authentication and Fraud Prevention System Pilot Project. This project seeks to (1) reduce the number of Medicaid fraud cases arising from authentication fraud and abuse; (2) reduce the total amount of Medicaid expenditures by generating substantial, measurable, and sustainable cost saving for taxpayers; (3) reduce the number of fraudulent participants in the Medicaid Program; and (4) comply with the requirements of House Bill 2292 relating to the implementation of this Pilot Project. Under the terms of the contract, IBG has acted as HHSC's Independent Evaluation Vendor for this Pilot Project.

The term of the original contract between HHSC and IBG commenced on January 27, 2004, and extends through March 31, 2005.

As required by the provisions of Texas Government Code, Chapter 2254, prior to amending its contract with IBG, HHSC extends this invitation to qualified and experienced consultants interested in providing the consulting services described in this notice. Unless a better offer (as determined by HHSC) is received from another vendor in response to this notice, HHSC intends to enter into negotiations with IBG to amend its consulting services contract, and to extend the term through November 30, 2005.

Scope of Work/Offer Specifications:

IBG acts as HHSC's Independent Evaluation Vendor for the Front-End Authentication and Fraud Precention System Pilot Project, which utilizes biometric identification technology to verify Medicaid recipients' identities.

As the Independent Evaluation Vendor for the Pilot Project, IBG (1) provides continuous evaluation and verification of operations and performance of the selected Pilot Project Vendors' solutions; (2) analyzes, evaluates, and provides routine reporting on Pilot Project activities and performance; (3) IBG alerts appropriate HHSC staff on any issues, deviations or potential problems with the Pilot Project; and (4) provides recommendations for corrective actions.

More detailed information regarding the Scope of Work Statement and specifications for submitting offers are available for review by potential interested consultants. Parties interested in reviewing the Scope of Work or submitting a competing offer should contact HHSC's sole point of contact regarding this notice, Ms. Sherry McCulley, Health and Human Services Commission, 909 West 45th Street, Austin, Texas 78751, Sherry.McCulley@hhsc.state.tx.us. Additional information will be placed on HHSC's website at http://www.hhsc.state.tx.us/about_hhsc/BusOpp/BO_opportunities.html

Finding of Fact:

HHSC has submitted a request to the Governor's Office of Budget, Planning, and Policy for a finding of fact that the requested consulting services are necessary. Execution of a contract or an amendment to the current contract is contingent upon receipt of such a finding.

Criteria for Selection:

HHSC intends to negotiate an amendment to its contract with IBG unless it receives a better offer for the desired services. HHSC will make its selection based on demonstrated competence, knowledge and qualifications, considering the reasonableness of the proposed fees for services.

How To Respond; Submittal Deadline:

All offers must be received no later than 5:00 pm, Central Time, on March 7, 2005. Submissions received after the deadline will not be considered. Offers must be submitted to HHSC's sole point of contact listed above.

Questions:

Questions concerning this invitation and all offers in response to this notice should be submitted in writing or by email and directed to HHSC's sole point of contact listed above.

HHSC reserves the right to accept or reject any or all proposals submitted. HHSC is under no legal or other obligation to execute any contracts on the basis of this notice. HHSC will not pay for any costs incurred by any entity in responding to this notice.

TRD-200500486
Carey E. Smith
General Counsel
Texas Health and Human Services Commission
Filed: February 2, 2005

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Notice of Intent to Amend Consulting Contract

The Health and Human Services Commission ("HHSC") currently contracts with MTG Management Consultants, L.L.C. ("MTG") to provide project management and related services in the Front-End Authentication and Fraud Prevention System Pilot Project. This project seeks to (1) reduce the number of Medicaid fraud cases arising from authentication fraud and abuse; (2) reduce the total amount of Medicaid expenditures by generating substantial, measurable, and sustainable cost saving for taxpayers; (3) reduce the number of fraudulent participants in the Medicaid Program; and (4) comply with the requirements of House Bill 2292 relating to the implementation of this Pilot Project. Under the terms of the contract, MTG has acted as HHSC's Project Management Vendor for this Pilot Project.

The term of the original contract between HHSC and MTG commenced on November 3, 2003, and extends through March 31, 2005.

As required by the provisions of Texas Government Code, Chapter 2254, prior to amending its contract with MTG, HHSC extends this invitation to qualified and experienced consultants interested in providing the consulting services described in this notice. Unless a better offer (as determined by HHSC) is received from another vendor in response to this notice, HHSC intends to enter into negotiations with MTG to amend its consulting services contract, and to extend the term through November 30, 2005.

Scope of Work/Offer Specifications:

MTG acts as HHSC's Project Management Vendor for the Front-End Authentication and Fraud Precention System Pilot Project, which utilizes biometric identification technology to verify Medicaid recipients' identities.

As the Project Management Vendor for the Pilot Project, MTG provides continuous project management and oversight of the Pilot Program, including operational, quality assistance (QA) and general support. MTG provides oversight of Pilot Project Vendors' performance and progress towards project milestones and it coordinates, collects and transmits Pilot Vendor data.

More detailed information regarding the Scope of Work Statement and specifications for submitting offers are available for review by potential interested consultants. Parties interested in reviewing the Scope of Work or submitting a competing offer should contact HHSC's sole point of contact regarding this notice, Ms. Sherry McCulley, Health and Human Services Commission, 909 West 45th Street, Austin, Texas 78751, Sherry.McCulley@hhsc.state.tx.us. Additional information will be placed on HHSC's website at http://www.hhsc.state.tx.us/about_hhsc/BusOpp/BO_opportunities.html

Finding of Fact:

HHSC has submitted a request to the Governor's Office of Budget, Planning, and Policy for a finding of fact that the requested consulting services are necessary. Execution of a contract or an amendment to the current contract is contingent upon receipt of such a finding.

Criteria for Selection:

HHSC intends to negotiate an amendment to its contract with MTG unless it receives a better offer for the desired services. HHSC will make its selection based on demonstrated competence, knowledge and qualifications, considering the reasonableness of the proposed fees for services.

How To Respond; Submittal Deadline:

All offers must be received no later than 5:00 pm, Central Time, on March 7, 2005. Submissions received after the deadline will not be considered. Offers must be submitted to HHSC's sole point of contact listed above.

Questions:

Questions concerning this invitation and all offers in response to this notice should be submitted in writing or by email and directed to HHSC's sole point of contact listed above.

HHSC reserves the right to accept or reject any or all proposals submitted. HHSC is under no legal or other obligation to execute any contracts on the basis of this notice. HHSC will not pay for any costs incurred by any entity in responding to this notice.

TRD-200500487

Carey E. Smith
General Counsel
Texas Health and Human Services Commission
Filed: February 2, 2005

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Department of State Health Services

Licensing Actions for Radioactive Materials

The Department of State Health Services has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout Texas" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Arlington	Dallas Cardiology Associates PA DBA Heart Place of Arlington	L05855	Arlington	00	01/25/05
Throughout Tx	Tri Dal Excavation	L05852	Southlake	00	01/27/05

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Addison	Mobile Diagnostic Systems Inc DBA Diagnostic Health Services	L03212	Addison	28	01/13/05
Amarillo	Baptist Saint Anthony's Health System	L01259	Amarillo	76	01/20/05
Austin	Austin Heart PA	L04623	Austin	23	01/18/05
Austin	Austin Heart PA	L05580	Austin	06	01/18/05
Austin	Austin Radiological Association	L00545	Austin	104	01/18/05
Austin	Columbia Saint David's Healthcare System LP DBA South Austin Hospital	L03273	Austin	58	01/24/05
Austin	Heart Hospital IV LP DBA Heart Hospital of Austin	L05215	Austin	14	01/14/05
Bedford	Dallas Cardiology Associates PA DBA Heart Place West	L05448	Bedford	10	01/12/05
Bedford	Dallas Cardiology Associates PA DBA Heart Place West	L05448	Bedford	11	01/25/05
Cleburne	Walls Regional Hospital DBA Harris Methodist Walls Regional Hospital	L02039	Cleburne	34	01/14/05
College Station	BCS Heart LLP	L04890	College Station	09	01/20/05
College Station	O I Analytical	L04238	College Station	11	01/28/05
Corpus Christi	Cardiology Associates of Corpus Christi	L04611	Corpus Christi	22	01/26/05
Corpus Christi	N-Spec Quality Services Inc	L05113	Corpus Christi	22	01/14/05
Dallas	Medical City Dallas Hospital DBA Medical City	L01976	Dallas	154	01/31/05
Dallas	Raytheon Company	L00946	Dallas	88	01/26/05
Dallas	Retina Foundation of the Southwest	L05528	Dallas	02	01/21/05
Dallas	Texas Hematology/Oncology Center PA DBA Patients Comprehensive Cancer Center	L05397	Dallas	08	01/14/05
Denton	Columbia Medical Center of Denton Subsidiary LP DBA Denton Regional Medical Center	L02764	Denton	56	01/13/05
Fort Worth	Consultants in Radiology PA	L05014	Fort Worth	14	01/26/05
Fort Worth	Harris Methodist Fort Worth	L01837	Fort Worth	97	01/28/05
Galveston	The University of Texas Medical Branch Office of Environmental Health and Safety	L01299	Galveston	04	01/13/05
Harlingen	Valley Baptist Medical Center	L01909	Harlingen	59	01/14/05
Houston	Cardinal Health	L01911	Houston	125	01/14/05
Houston	Cardinal Health	L05536	Houston	12	01/13/05

CONTINUED AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Houston	Diagnostic Clinic of Houston Nuclear Medicine	L03452	Houston	30	01/13/05
Houston	Kelsey Seybold Clinic PA	L00391	Houston	57	01/24/05
Houston	Methodist Health Centers DBA Methodist Willowbrook Hospital	L05472	Houston	15	01/24/05
Houston	Real Inspection Training Engineering	L05136	Houston	10	01/27/05
Houston	River Oaks Medical Center LP DBA Twelve Oaks Medical Center	L02432	Houston	43	01/21/05
Houston	The Methodist Hospital	L00457	Houston	129	01/14/05
Houston	Weatherford US LP	L02756	Houston	20	01/21/05
Kerrville	Kerrville Cardiovascular Center LTD	L05334	Kerrville	02	01/24/05
Killeen	Metroplex Hospital	L03185	Killeen	22	01/26/05
Killeen	Metroplex Hospital	L03185	Killeen	23	01/28/05
La Grange	Austin Heart La Grange	L05516	La Grange	05	01/18/05
Longview	Eastman Chemicals Company Texas Operations	L00301	Longview	96	01/24/05
Longview	Texas Oncology DBA East Texas PET Imaging	L05489	Longview	12	01/20/05
Lubbock	Texas Tech University Health Sciences Center	L01869	Lubbock	73	01/19/05
Lubbock	University Medical Center	L04719	Lubbock	75	01/12/05
Marble Falls	Austin Heart PA DBA Austin Heart Clinic Marble Falls	L05505	Marble Falls	06	01/18/05
McAllen	Advanced Nuclear Imaging Inc	L05467	McAllen	05	01/20/05
McAllen	Cardio Consulting LLC	L05821	McAllen	01	01/26/05
McAllen	Valley Heart Consultants	L05330	McAllen	04	01/21/05
McKinney	Cardiac Center of Texas PA	L05744	McKinney	03	01/13/05
Midland	Endeavor Energy Resources LP	L05745	Midland	02	01/25/05
Midland	Reeves Wireline Services Inc	L04405	Midland	14	01/14/05
Pampa	Coronado Community Hospital Inc DBA Columbia Medical Center of Pampa	L03123	Pampa	19	01/13/05
Port Arthur	The Premcor Refining Group Inc Port Arthur Refinery	L04871	Port Arthur	06	01/13/05
Richardson	Richardson Diagnostic Imaging I LP DBA Quantum Diagnostic Imaging	L05468	Richardson	06	01/27/05
Round Rock	Austin Heart PA DBA Austin Heart	L05456	Round Rock	08	01/14/05
Round Rock	Columbia/St Davids Healthcare System LP DBA Medical Center of Round Rock	L03469	Round Rock	37	01/13/05
San Antonio	Methodist Healthcare System of San Antonio DBA Methodist Hospital	L00594	San Antonio	198	01/24/05
San Antonio	Snip and Ference PA	L00106	San Antonio	20	01/14/05
San Antonio	University Physicians Group Nuclear Cardiology	L05410	San Antonio	03	01/24/05
San Antonio	University Physicians Group Nuclear Cardiology	L05410	San Antonio	04	01/26/05
San Antonio	VHS San Antonio Partners LP DBA Baptist Health System	L00455	San Antonio	139	01/21/05
San Antonio	VHS San Antonio Partners LP DBA Baptist Health System	L00455	San Antonio	140	01/26/05

CONTINED AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
San Marcos	Austin Heart PA DBA Austin Heart San Marcos	L05452	San Marcos	09	01/18/05
Sugar Land	Methodist Health Centers DBA Methodist Willowbrook Hospital	L05472	Sugar Land	14	01/13/05
Texas City	Valero Refining Company	L02578	Texas City	26	01/14/05
The Woodlands	E+ PET Imaging VIII LP DBA PET Imaging of the Woodlands	L05747	The Woodlands	05	01/25/05
The Woodlands	Saint Lukes Community Medical Center The Woodlands	L05763	The Woodlands	01	01/27/05
Tomball	Clinic for Cardiovascular Care PA DBA Cardiovascular Clinic of Texas	L05670	Tomball	02	01/14/05
Tyler	Tyler Cardiovascular Consultants PA CVC	L05242	Tyler	06	01/26/05
Webster	Clear Lake Cardiology Associates PA	L05549	Webster	03	01/27/05
Throughout Tx	Enprotec Inc	L04266	Abilene	12	01/14/05
Throughout Tx	RCOA Imaging Services Inc	L05329	Amarillo	12	01/24/05
Throughout Tx	Fugro Consultants LP	L03875	Austin	17	01/27/05
Throughout Tx	Radiation Technology Inc	L04633	Austin	17	01/21/05
Throughout Tx	ConocoPhillips Pipe Line Company DBA Petroleum Transportation	L02083	Bartlesville OK	18	01/21/05
Throughout Tx	Gulf Coast Weld Spec	L05426	Beaumont	31	01/25/05
Throughout Tx	Baker Hughes Oilfield Operations Inc DBA Baker Atlas	L00446	Houston	156	01/26/05
Throughout Tx	H & G Inspection Company Inc ADBA Statewide Maintenance Company	L02181	Houston	193	01/27/05
Throughout Tx	Halliburton Energy Services Inc	L02113	Houston	104	01/21/05
Throughout Tx	Nuclear Scanning Services Inc	L04339	Houston	17	01/13/05
Throughout Tx	Stork Southwestern Laboratories Inc	L00299	Houston	120	01/25/05
Throughout Tx	Spectro Analytical Instruments Inc	L02788	Marble Falls	44	01/27/05
Throughout Tx	Anatec Inc	L04865	Nederland	58	01/26/05
Throughout Tx	Turner Specialty Services LLC	L05417	Nederland	12	01/27/05
Throughout Tx	Conam Inspection & Engineering Inc	L05010	Pasadena	83	01/21/05
Throughout Tx	Conam Inspection & Engineering Inc	L05010	Pasadena	84	01/24/05
Throughout Tx	Fugro Consultants LP	L04322	Pasadena	75	01/27/05
Throughout Tx	Texas Gamma Ray LLC	L05561	Pasadena	45	01/21/05
Throughout Tx	Texas Gamma Ray LLC	L05561	Pasadena	46	01/26/05
Throughout Tx	Alcoa Inc	L04316	Rockdale	16	01/22/05
Throughout Tx	Martin Marietta Materials Southwest LTD	L04768	San Antonio	06	01/22/05
Throughout Tx	Isbell Engineering Group Inc	L05355	Sanger	08	01/25/05
Throughout Tx	Schlumberger Technology Corporation	L01833	Sugar Land	123	01/14/05
Throughout Tx	Oxbow Carbon & Minerals LLC	L04051	Texas City	10	01/25/05
Throughout Tx	H & H X-Ray Services Inc	L02516	Tyler	50	01/25/05
Throughout Tx	P & S Perforators Inc	L02396	Victoria	25	01/27/05

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Alice	Adcock Pipe and Supply Inc	L05491	Alice	01	01/26/05
Beaumont	The Goodyear Tire & Rubber Beaumont Chemical Plant	L04006	Beaumont	14	01/25/05
Brownsville	Christopher R Gill MD PA DBA Valley Cardiac Care Center	L05725	Brownsville	01	01/28/05
Brownwood	Minnesota Mining & Manufacturing Company Traffic Control Materials Division	L00918	Brownwood	35	01/24/05
Bryan	Texas Municipal Power Agency Gibbons Creek Steam Electric	L02913	Bryan	17	01/24/05
Corsicana	Navarro Hospital Inc LP DBA Navarro Regional Hospital	L02458	Corsicana	27	01/24/05
Dallas	Cooper Medical Imaging LLP	L05138	Dallas	07	01/25/05
Dallas	E+ Pet Imaging LP DBA Pet Imaging of Dallas	L05726	Dallas	04	01/28/05
Dallas	The Center for Molecular Imaging LP DBA Southwest Diagnostic Center for Molecular Imaging	L05715	Dallas	02	01/28/05
Denton	Numed Diagnostic Imaging	L02129	Denton	54	01/24/05
Denton	Trace Radiochemicals Inc	L05435	Denton	07	01/26/05
Denton	Triad Denton Hospital LP DBA Denton Community Hospital	L04003	Denton	32	01/24/05
Ferris	Fred Maese MD PA DBA Ferris Heart Center	L05409	Ferris	04	01/26/05
Fort Worth	Adventist Health System Sunbelt Healthcare Corporation DBA Huguley Health System	L02920	Fort Worth	26	01/24/05
Fort Worth	Radiology Associates	L03953	Fort Worth	36	01/27/05
Houston	Antoine G Younis MD PA	L05313	Houston	06	01/25/05
Houston	Goodyear Tire & Rubber Company	L00264	Houston	25	01/24/05
Houston	Methodist Health Centers DBA Methodist Willowbrook Hospital	L05472	Houston	16	01/26/05
Houston	North Houston Imaging Center LTD	L04591	Houston	04	01/25/05
Houston	University Care Plus	L05465	Houston	01	01/26/05
Irving	Las Colinas Pet Imaging LLP	L05724	Irving	02	01/28/05
Kaufman	Presbyterian Hospital of Kaufman	L03337	Kaufman	14	01/24/05
Kingsville	Christus Spohn Health System DBA Christus Spohn Hospital Kleberg	L02917	Kingsville	37	01/24/05
La Porte	Rohm and Haas Company Bayport Plant	L04368	La Porte	09	01/25/05
Lancaster	Columbia Medical Center At Lancaster Subsidiary LP DBA Medical Center at Lancaster	L03342	Lancaster	22	01/28/05
Llano	Llano County Hospital Authority DBA Llano Memorial Healthcare System	L04438	Llano	20	01/25/05
Longview	Eastman Chemicals Company Texas Operations	L00301	Longview	96	01/24/05
Longview	High Tech Testing Service Inc	L05021	Longview	50	01/25/05
Longview	King Tool Company	L05142	Longview	03	01/25/05
Lubbock	W Chuck Brogan III MD PhD PA	L05488	Lubbock	04	01/26/05

CONTINUED RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Mesquite	Saleem Mallick MD PA	L05231	Mesquite	10	01/25/05
Midland	Endeavor Energy Resources LP	L05745	Midland	03	01/28/05
Mount Pleasant	Titus County Memorial Hospital	L02921	Mount Pleasant	18	01/24/05
Nederland	Murlidhar A Amin MD PA	L05735	Nederland	01	01/28/05
Odessa	Environmental Lab of Texas Inc	L05499	Odessa	02	01/26/05
San Antonio	Cancer Therapy and Research Center Research Foundation DBA Institute for Drug Development	L03350	San Antonio	36	01/24/05
San Antonio	Endocrinology Nuclear Medicine Associates PA	L03343	San Antonio	13	01/24/05
San Antonio	Heart Hospital of San Antonio LP DBA Texsan Heart Hospital	L05722	San Antonio	04	01/28/05
Sherman	David F Davis MD FACC PA	L05477	Sherman	02	01/26/05
Texas City	Sid Acharya MD PA DBA Cardiovascular Specialists of Texas	L05714	Texas City	03	01/26/05
Webster	Diagnostic Systems Laboratories Inc	L03084	Webster	30	01/17/05
Throughout Tx	Talon Drilling Inc DBA Llano-Permian Environmental	L05641	Amarillo	02	01/26/05
Throughout Tx	Engineering Consulting Services Inc	L05319	Austin	01	01/26/05
Throughout Tx	Alliance Geotechnical Group Inc	L05314	Dallas	07	01/25/05
Throughout Tx	GME Consulting Services Inc	L05128	Dallas	03	01/25/05
Throughout Tx	Team Consultants Inc	L04012	Dallas	08	01/25/05
Throughout Tx	Encon International Inc	L04528	El Paso	10	01/25/05
Throughout Tx	Jobe Concrete Products Inc	L04021	El Paso	12	01/25/05
Throughout Tx	Sterigenics US Inc	L03851	Fort Worth	33	01/24/05
Throughout Tx	Lone Star Testing Laboratories	L04013	Houston	12	01/25/05
Throughout Tx	QC Laboratories Inc	L04750	Houston	11	01/25/05
Throughout Tx	Weatherford US LP	L05291	Houston	08	01/25/05
Throughout Tx	Williams Brothers Construction Company Inc	L04823	Houston	05	01/25/05
Throughout Tx	Parkland Engineering and Testing Inc	L04089	Irving	05	01/22/05
Throughout Tx	Texas Oncology PA DBA East Texas Pet Imaging	L05489	Longview	13	01/26/05
Throughout Tx	Texas Tech University Environmental Health and Safety	L01536	Lubbock	76	01/24/05
Throughout Tx	Kellys Pipe Inspection Inc	L05120	Midland	01	01/25/05
Throughout Tx	Glenn Fuqua Inc	L04736	Navasota	04	01/25/05
Throughout Tx	Royal Wireline Inc	L03110	Riviera	22	01/28/05
Throughout Tx	Geotechnical Consultants Inc	L04819	San Antonio	06	01/25/05
Throughout Tx	Geotechnical Consultants Inc	L04819	San Antonio	07	01/28/05
Throughout Tx	Southwest Research Institute	L00775	San Antonio	70	01/24/05
Throughout Tx	E M Hobbs LP	L05738	Sonora	05	01/29/05
Throughout Tx	Frontera Materials Inc	L04830	Weslaco	09	01/25/05

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Brownsville	Brownsville Medical Center	L01526	Brownsville	36	01/18/05
Pittsford NY	Exegenics Inc	L05299	Pittsford NY	02	01/14/05
Seminole	Seminole Hospital District of Gains County	L03118	Seminole	16	01/28/05
Stafford	Hansbury Enterprises Inc DBA Dolphin Environmental Consultants	L05027	Stafford	02	01/26/05
San Antonio	The Whole Computer	L05244	San Antonio	05	01/27/05

In issuing new licenses, amending and renewing existing licenses, or approving license exemptions, the Department of State Health Services (department), Radiation Safety Licensing Branch, has determined that the applicant has complied with the applicable provisions of Title 25 Texas Administrative Code (TAC), Chapter 289 regarding radiation control. In granting termination of licenses, the department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC, Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC, Chapter 289.

This notice affords the opportunity for a hearing on written request of a person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A person affected may request a hearing by writing Richard A. Ratliff, Radiation Program Officer, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756-3189. For information call (512) 834-6688.

TRD-200500483
Cathy Campbell
Director, Legal Services
Department of State Health Services
Filed: February 2, 2005

♦ ♦ ♦

Notice of Agreed Order with Central Testing Company, Inc.

On January 28, 2005, the Radiation Program Officer, Department of State Health Services (department), approved the settlement agreement between the department and Central Testing Company, Inc. (licensee-Reciprocity) of Sulphur, Louisiana. A total administrative penalty in the amount of $2,000 was assessed the licensee for violations of 25 Texas Administrative Code, Chapter 289. Of the total administrative penalty, $1,000 will be probated for a period of one year, and will be forgiven if the registrant complies with additional settlement agreement requirements.

A copy of all relevant material is available, by appointment, for public inspection at the Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200500481
Cathy Campbell
Director, Legal Services
Department of State Health Services
Filed: February 2, 2005

♦ ♦ ♦

Notice of Default Order Against Weslaco Radiology Center, Inc.

On January 31, 2005, the Radiation Program Officer, Department of State Health Services (department), signed a Default Order against Weslaco Radiology Center, Inc. (registrant - M00290) of McAllen. A total administrative penalty in the amount of $10,000 was assessed registrant for violations of 25 Texas Administrative Code, Chapter 289.

A copy of all relevant material is available, by appointment, for public inspection at the Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200500482
Cathy Campbell
Director, Legal Services
Department of State Health Services
Filed: February 2, 2005

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Texas Parks and Wildlife Department

Notice of Availability and Request for Comments

PROPOSED SETTLEMENT AGREEMENT FOR NATURAL RESOURCE DAMAGES RELATED TO THE SULFURIC ACID RELEASE INTO THE TEXAS CITY SHIP CHANNEL, GALVESTON COUNTY, TEXAS

AGENCIES: Texas Parks and Wildlife Department (TPWD), Texas Commission on Environmental Quality (TCEQ) and the Texas General Land Office (TGLO), (collectively, the Trustees).

ACTION: Notice of availability of a proposed Settlement Agreement for Natural Resource Damages related to the Martin Product Sales LLP ("Martin") sulfuric acid release and of a 30-day period for public comment on the Agreement beginning the date of publication of this notice.

SUMMARY: Notice is hereby given that the Trustees propose a Settlement Agreement to compensate for natural resource injuries and

ecological service losses attributable to the release of hazardous substances into the navigable waters of the Texas City Ship Channel in the Texas City Harbor in Galveston Bay, Galveston County, Texas ("Incident"). The proposed Agreement calls for the responsible party to provide $178,000 to the Trustees to be used for a restoration project or projects in the Galveston Bay system that will provide natural resource services equivalent to those injured or lost as a result of the Incident.

The opportunity for public review and comment on the proposed Settlement Agreement announced in this notice is required under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 United States Code (U.S.C.) §9622(i) and parallel provisions in 43 Code of Federal Regulations (C.F.R.) §11.32(c) of the Natural Resource Damage Assessment regulations.

ADDRESSES: A copy of this proposed Settlement Agreement may be obtained by contacting: Don Pitts, Trustee Program, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744, Phone: (512) 912-7151, e-mail: don.pitts@tpwd.state.tx.us.

DATES: Comments must be submitted in writing within 30 days of the publication of this notice to Don Pitts of the Texas Parks and Wildlife Department at the address listed in the previous paragraph. The Natural Resource Trustees will consider all written comments received during the comment period prior to finalizing the proposed Settlement Agreement.

SUPPLEMENTARY INFORMATION: On November 3, 2003, a barge owned and operated by Echo Towing and carrying concentrated sulfuric acid owned by Martin capsized at the Sterling Chemicals Terminal and began leaking concentrated sulfuric acid into the navigable waters of the Texas City Channel ("Channel") in Texas City Harbor in Galveston Bay, Galveston County, Texas. Information available to the Trustees, Martin and the United States Environmental Protection Agency ("EPA") indicated that the barge was carrying approximately 235,000 gallons of concentrated sulfuric acid.

The United States Coast Guard, EPA, TCEQ, TGLO, TPWD, National Oceanic and Atmospheric Administration and the United States Fish and Wildlife Service responded to the threat of a large release of sulfuric acid into the navigable waters of the Channel. The leaking barge was righted. However, on November 5, 2003, during attempts to stabilize the barge, the barge again rolled over on its side. During the response, the structural integrity of the barge continued to degrade showing signs of bulging and heating. Because sulfuric acid reacts violently with water, producing heat and hydrogen gas, the resulting potential for explosion posed an imminent and substantial endangerment to the public health, welfare and the environment which dictated that gradual offloading or regulated discharge attempts be abandoned. Consequently, the remaining sulfuric acid was released directly into the Channel.

TPWD, TCEQ, and TGLO are designated natural resource trustees under Section 107(f) of CERCLA, 42 U.S.C. §9607(f); Section 311 of the Federal Water Pollution and Control Act (FWPCA), 33 U.S.C. §1321; and other applicable federal or state laws, including Subpart G of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 C.F.R. §§300.600 - 300.615. The Trustees are authorized to act on behalf of the public under these authorities to assess and restore natural resources injured or lost as a result of discharges or releases of hazardous substances into the environment.

The Natural Resource Trustees have determined that resources subject to their trust authority under these Acts were exposed to sulfuric acid and low pH waters as a result of the release. The quantity and concentration of the material released was sufficient to result in the mortality of aquatic organisms. Consequently the Trustees are seeking the restoration of coastal aquatic resources and services lost as a result of the Incident.

Natural resources and associated services identified as lost, injured, and/or interrupted by the Incident were determined from the results of a Type A Assessment Model for Coastal and Marine Environments and include sub-tidal, unvegetated soft-bottom benthic habitats, benthic organisms and demersal and mid-water column fish and shellfish in the Channel.

The Trustees and Martin have reviewed all of the available data and restoration scaling completed by the Trustees, and agreed to settle natural resource liability for injuries that resulted from the incident. Martin has agreed to pay $178,000.00 to the Trustees for the construction of a restoration project or projects in the Galveston Bay system that will provide natural resource services equivalent to those injured or lost as a result of the Incident. The Trustees will prepare and notice a Restoration Plan prior to the implementation of restoration actions.

For further information contact: Don Pitts at (512) 912-7151, fax: (512) 912-7160, e-mail: don.pitts@tpwd.state.tx.us.

TRD-200500415
Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
Filed: January 28, 2005

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Texas Board of Professional Engineers

Policy Advisory Stakeholder Request EAOR #11--Environmental Document Preparation

The Texas Board of Professional Engineers (Board) is given authority to issue advisory opinions under Subchapter M, Chapter 1001 of the Occupations Code (Texas Engineering Practice Act). The Board is required to issue an advisory opinion about interpretations of the Texas Engineering Practice Act in regard to a specific existing or hypothetical factual situation if requested by a person and to respond to that request within 180 days.

Pursuant to that requirement, the Board hereby notifies potential stakeholders that it has received an advisory opinion request regarding environmental document preparation. More specifically, the request asks for an opinion analyzing the engineering elements of, and the engineering supervision required for, environmental document preparation, particularly in relation to transportation projects. Examples of these documents include, but are not limited to, environmental assessments, environmental impact statements, environmental information reports, and other similar documents. Due to the nature of the request, we expect to have input from those agencies or companies that work on transportation projects (i.e. Texas Department of Transportation) and others that may have interest in this topic. The Board has developed a stakeholder process to gather information from professional engineers, and consultants and other interested parties. The policy advisory will be written with consideration given to stakeholder comments. This notice is intended to generate a list of possible stakeholders and to initiate public comment. The Board plans to schedule a stakeholder meeting near the end of February, or early in March 2005. Please let us know of any preferences you may have concerning the scheduling of the Stakeholder meeting. All comments and stakeholder information should be directed to:

Texas Board of Professional Engineers

1917 IH 35 South

Austin, Texas 78741

Attention: Policy Advisory Staff

Or by e-mail to: peboard@tbpe.state.tx.us

TRD-200500480
Dale Beebe Farrow, P.E.
Executive Director
Texas Board of Professional Engineers
Filed: February 2, 2005

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Public Utility Commission of Texas

Notice of Application for Amendment to Certificated Service Area Boundary

Notice is given to the public of an application filed on January 27, 2005, with the Public Utility Commission of Texas, for an amendment to a certificated service area boundary.

Docket Style and Number: Application of Southwestern Bell Telephone, L.P., doing business as SBC Texas, to Amend Certificate of Convenience and Necessity to Modify the Service Area Boundaries of the Lampasas Exchange (SBC Texas) and the Burnet Exchange (Verizon). Docket Number 30703.

The Application: SBC Texas' request will realign the service area boundaries between its Lampasas Exchange and the Burnet Exchange of Verizon Southwest in order for SBC Texas to provide local exchange telephone service to a customer who is currently without local telephone service in an area for which Verizon does not have nearby facilities.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas by February 18, 2005, by mail at P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 30703.

TRD-200500448
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 1, 2005

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Notice of Application for Certificate of Convenience and Necessity for a Proposed Transmission Line in Brazoria County, Texas

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on January 28, 2005, for a certificate of convenience and necessity for a proposed transmission line in Brazoria County, Texas

Docket Style and Number: Application of CenterPoint Energy Houston Electric, LLC for a Certificate of Convenience and Necessity for a Proposed Transmission Line within Brazoria County, Texas. Docket Number 30617.

The Application: The proposed project is designated as the 69 kV Service to Freeport LNG's Quintana (QNTANA) Substation. CenterPoint Energy Houston Electric, LLC (CNP) proposes to construct a new 69 kV double circuit transmission line in southeast Brazoria County, Texas to serve a new customer, Freeport LNG Development, L.P. This application includes facilities subject to the Coastal Management Program and must be consistent with the Coastal Management Program goals and policies.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. The deadline for intervention in this proceeding is March 14, 2005. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 30617.

TRD-200500450
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 1, 2005

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on January 28, 2005, for a service provider certificate of operating authority (SPCOA), pursuant to Public Utility Regulatory Act (PURA) §§54.151 - 54.156. A summary of the application follows.

Docket Title and Number: Application of PNG Telecommunications, Inc. for a Service Provider Certificate of Operating Authority, Docket Number 30704 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, ADSL, ISDN, HDSL, SDSL, RADSL, VDSL, T1-Private Line, Switch 56 KBPS, Frame Relay, Fractional T1, long distance and wireless services.

Applicant's requested SPCOA geographic area includes the entire State of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than February 16, 2005. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 30704.

TRD-200500447
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 1, 2005

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on January 28, 2005, for a service provider certificate of operating authority (SPCOA), pursuant to Public Utility Regulatory Act (PURA) §§54.151 - 54.156. A summary of the application follows.

Docket Title and Number: Application of Tel West Network Services Corporation for a Service Provider Certificate of Operating Authority, Docket Number 30705 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, ADSL, ISDL, HDSL, SDSL, VDSL, Optical Services, T1-Private Line, Switch 56 KBPS, Frame Relay, Fractional T1, long distance and wireless services.

Applicant's requested SPCOA geographic area includes the area of Texas currently served by SBC Texas and Verizon SW.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than February 16, 2005. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 30705.

TRD-200500446
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 1, 2005

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Notice of Application to Amend Certificated Service Area Boundaries

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application filed on January 18, 2005, for an amendment to certificated service area boundaries.

Docket Style and Number: Application of CenterPoint Energy Houston Electric, LLC (CenterPoint Energy) and Entergy Gulf States, Incorporated (EGSI) for a Certificate of Convenience and Necessity for Service Area Boundaries within Montgomery County, Texas. Docket Number 30692.

The Application: The proposed boundary amendment will add approximately 73.7 acres to the service territory of CenterPoint Energy and approximately 88.7 acres to the service territory of EGSI, resulting in a net loss of 15 acres to CenterPoint Energy. The transfer will not affect electric service to any existing customer because the proposed line would reflect the utility currently serving the area. CenterPoint Energy and EGSI are the only utilities that are affected by the proposed boundary change and both have agreed to the proposed amendment.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas no later than February 18, 2005, by mail at P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 30692.

TRD-200500449
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 1, 2005

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Texas Department of Transportation

Notice of Request for Proposal

The Texas Department of Transportation (TxDOT) announces a Request for Proposal (RFP) for intercity bus mobility projects funded through the Federal Transit Administration (FTA) §5311(f) intercity bus program. It is anticipated that multiple projects will be selected. Project selection will be administered by the Public Transportation Division (PTN). Selected projects will be awarded in the form of grants, with payments made for allowable reimbursable expenses or for defined deliverables. The proposer will become a subrecipient of TxDOT.

Purpose: The RFP invites proposals for services to develop, promote, or support intercity bus mobility. The objectives for these proposals are to support the connection between nonurbanized areas and the larger regional or national system of intercity bus service, to support services to meet the intercity travel needs of residents in nonurbanized areas, or to support the infrastructure of the intercity bus network through planning, marketing assistance, and capital investment in facilities. In the process of meeting these objectives, projects are also to support and promote the coordination of public transportation services across geographies, jurisdictions, and program areas. Coordination between nonurbanized and urbanized areas and between client transportation services and other types of public transportation are particular objectives.

Eligible Projects: Eligible types of projects have been defined by TxDOT in accordance with FTA guidelines, other laws and regulations, and in consultation with members of the public transportation and the intercity bus industries. These include projects for facilities, vehicle capital, planning, marketing, and operating assistance.

Eligible Applicants: Proposers shall be required to enter into a grant agreement as a subrecipient of TxDOT. Eligible subrecipients include state agencies, local public bodies and agencies thereof, private-nonprofit organizations, operators of public transportation services, and private for-profit operators.

Availability of Funds: In accordance with the Transportation Code, Chapter 455, TxDOT currently provides funding for intercity bus mobility projects, funded through FTA §5311(f) intercity bus program. Upon full reauthorization of the Federal transit appropriations bill, the total amount available is expected to be $1.3 million dollars.

Work Package: All proposals must demonstrate how they address intercity bus mobility needs. To aid proposers in documenting these needs and developing proposals in response, TxDOT has prepared a work package of intercity bus inventory data, demographics, and thematic maps. The work package is available on the PTN website at http://www.dot.state.tx.us/ptn/geninfo.htm. The work package represents the best available data compiled with professional judgment. Data are derived from multiple sources, some of which are known to be incomplete and inaccurate. Part of the reason for publishing this work package is to provide the intercity bus industry with an opportunity to evaluate the accuracy of this compiled data, propose projects to improve or extend the inventories, and to note discrepancies and suggest corrections. Documentation of needs must be based on the TxDOT work package unless an alternative source of data can be demonstrated to be superior.

Review and Award Criteria: Proposals will be evaluated against a matrix of criteria and then prioritized. Subject to available funding, TxDOT is placing no preconditions on the number or on the types of projects to be selected for funding. During the evaluation phase of each proposal, TxDOT reserves the right to conduct formal negotiations pertaining to a proposer's initial responses, specifications, and prices. There will be a $150,000 maximum award for each project. In multiple year projects, only the first year funding will be limited to $150,000. An approximate balance in funding awarded to the five types of projects, or an approximate geographic balance to selected projects, may be seen as appropriate, depending on the proposals that are received. TxDOT may consider these additional criteria when recommending prioritized projects to the Texas Transportation Commission.

Key Dates and Deadlines:

March 1, 2005 Written questions for the proposal are due at PTN.

March 15, 2005 Written responses to questions posted on PTN web site and mailed to all firms who submitted questions.

April 4, 2005 Deadline for receipt of proposals.

May 13, 2005 Target date for TxDOT to complete the evaluation, prioritization, and negotiation of proposals.

June 30, 2005 Presentation of project selection recommendations to the Texas Transportation Commission for its action.

August 1, 2005 Target date for all project grant agreements to be executed, with approved scopes of work and calendars of work.

To Obtain a Copy of the RFP: The RFP will be posted on the Public Transportation Division web site at http://www.dot.state.tx.us/ptn/geninfo.htm. Proposers with questions relating to the RFP should contact Susan Hausmann at shausman@dot.state.tx.us, or by phone at (512) 416-2833.

TRD-200500466
Bob Jackson
Deputy General Counsel
Texas Department Of Transportation
Filed: February 2, 2005

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Record of Decision--Eastern Extension of the President George Bush Turnpike (PGBT)

The following Record of Decision for the Eastern Extension of the President George Bush Turnpike (PGBT) project was signed by the Federal Highway Administration (FHWA) on January 24, 2005. The project is being developed jointly with the FHWA, Texas Department of Transportation and North Texas Tollway Authority.

A. Decision

Based on the Final Environmental Impact Statement (FEIS) and Final Section 4(f) Evaluation, Alternative #EIS-1 is the selected alternative for the construction of Eastern Extension of the President George Bush Turnpike (PGBT).

The purpose and need for the Eastern Extension of the PGBT is to address the region's rapid growth, transportation demand, and the needs for mobility, system linkages, economic development, and intermodal connections. The selected alternative, Alternative #EIS-1, best meets the purpose and need for the project. It would be most compatible with local comprehensive plans, have greater economic benefits, have less impact on planned community facilities, attract the largest predicted traffic volumes, impact the fewest noise receivers, and has the support of local government and communities. The selected alternative is a new location controlled access tollway from SH 78 to IH 30, a distance of approximately 10 miles. Improvements include a new six-lane tollway with a directional interchange at IH 30. In addition, there will be full access interchanges at SH 78, Northeast Parkway, and the proposed Merritt/Liberty Grove Connector, and partial or split diamond configuration interchanges at Miles Road, Merritt Road, SH 66, Main Street, Miller Road, and the proposed Entertainment District. To maintain local access and provide opportunities for economic development, potential frontage roads would be included between SH 78 and Northeast Parkway, Miles Road and Merritt Road, and Liberty Grove to the proposed Entertainment District.

B. Alternatives Considered

During the Major Investment Study (MIS), a No-Build, Transportation Systems Management/Congestion Management System Alternative, and six freeway/tollway options were studied. Based on the MIS and input from the agencies and public, two tollway alternatives and the No-Build Alternative were analyzed in the FEIS. Chapter 2.0- Alternatives Analysis of the FEIS describes the alternatives and Chapter 8.0- Preferred Alternative discusses the process used to identify the preferred alternative.

The No-Build alternative would be to not construct Eastern Extension of the PGBT. It would include implementation of programmed improvements, or projects that are listed in the regional plan and have funding dedicated for their construction. The No-Build Alternative serves as the baseline for comparison against the reasonable build alternatives. Because this alternative does not satisfy the purpose and need, it was eliminated from further consideration.

Alternative #EIS-1 begins at the intersection of SH 78 and Northeast Parkway and follows Northeast Parkway for approximately 0.5 miles in a southeasterly direction. It turns northeast to cross Old Miles Road and continues for approximately two miles to intersect with Merritt Road. It begins to curve in a southeast direction for approximately two miles to intersect with Liberty Grove. It then follows Liberty Grove south to the intersection of Liberty Grove and SH 66 and continues south on Kirby Road toward Lake Ray Hubbard. It then crosses Lake Ray Hubbard, extending toward the southern part of the peninsula, to intersect with IH 30 in the vicinity of Peninsula Way. The length is 9.9 miles.

Alternative #EIS-2 begins at the intersection of SH 78 and Northeast Parkway and follows Northeast Parkway for approximately 0.5 miles in a southeasterly direction. It turns northeast to intersect with Old Miles Road. It then extends southeast for approximately two miles, crossing Castle Road and Hickox Road, to intersect with Liberty Grove. It follows Liberty Grove south to the intersection of Liberty Grove and SH 66 and continues south, along the west side of Kirby Road toward Lake Ray Hubbard. The alignment crosses Lake Ray Hubbard, extending toward the southern part of the peninsula, to intersect with IH 30 in the vicinity of Zion Road. The length is 9.5 miles.

Three public meetings were held from September 2000 to March 2001 to gather public input on the alternatives being considered. In addition to the public meetings, project newsletters were published, project information was placed at public libraries and websites, and numerous public presentations were made. Also, the project's Community Work Group met four times and Staff Work Group met 13 times. A public hearing was held on June 24, 2003. Details of the public and agency involvement process can be found in Chapter 6.0- Public and Agency Involvement.

During the evaluation of the alternatives, implicit community and agency values relative to social, economic, and environmental factors were clearly articulated in the decision-making process. Based on these values, the following determinations were made: 1) provide to the greatest extent possible opportunities and access for economic development and 2) minimize visual and noise impacts to the greatest extent possible. In response to the Draft EIS, 101 written statements from agencies, individuals, and organizations, 32 verbal statements, 12 resolutions, and two petitions were received. The majority of comments were related to the choice of an alignment. Of the comments received related to the alignment, 70 supported Alternative #EIS-1, four supported Alternative #EIS-2, six supported the project but no specific alternative, and two preferred the No-Build Alternative.

Because mitigation strategies and the net results would be the same, the differences between the two alternatives are small and are generally a function of the length of the alternatives. Alternative #EIS-1 would be most compatible with local comprehensive plans, have greater economic benefits, have less impact on planned community facilities, attract the largest predicted traffic volumes, impact the fewest noise receivers, and has the support of local government and communities. Most of the other environmental impacts for the two alternatives are comparable, although Alternative #EIS-1 is longer and therefore would

require more land, and impact more floodplain and waters of the U.S. It would also displace more residents in the area, especially apartment tenants. Alternative #EIS-2 is the environmentally preferred alternative because it would impact less land, wetlands, biological resources, and would displace few residences. However, as stated in Section A., Alternative #EIS-1 was identified as best meeting the purpose and need for the project.

Based on the information contained in the DEIS, public and agency comments, and resolutions of support from local governments, the FEIS identified Alternative #EIS-1 as the preferred alternative for the Eastern Extension of the PGBT.

Alternative #EIS-1 would have a direct impact on the Coyle House Farmstead, a property eligible for the National Register of Historic Places (NRHP). A mitigation plan has been executed to preserve the Coyle House Farmstead offsite (please see Section C). Although Alternative #EIS-2 avoids a direct taking of the Coyle House Farmstead, there are unique problems involved in the use of that alternative. Alternative #EIS-2 would foster new development pressure, indirectly eroding the integrity of the setting from which the Coyle House derives much of its local significance and ultimately resulting in the re-development of the farmstead.

The design concept and scope of the proposed action is consistent with the area's financially constrained Metropolitan Transportation Plan, known as *Mobility 2025- 2004 Update* and the fiscal year *2004-2006 Transportation Improvement Program* found to conform to the Clean Air Act Amendments of 1990 by the U.S. Department of Transportation (DOT) on April 8, 2004. Additionally, the project comes from an operational Congestion Management System that meets all requirements of 23 Code of Federal Regulations- Highways, Parts 450 and 500.

C. Section 4(f) Evaluation

The Section 4(f) evaluation is included in Chapter 5- Section 4(f) Evaluation of the FEIS. As discussed in Section B., Alternative #EIS-1 would have a direct impact on the Coyle House Farmstead. A Section 4(f) Statement was prepared and concluded there are no feasible and prudent alternatives to the use of land from the Coyle House Farmstead. Other alignment alternatives were investigated and found to have social, economic, and environmental impacts that reach extraordinary magnitudes. An alignment farther to west is severely constrained by the presence of Herfurth Park [a Section 4(f) and 6(f) resource], the Rowlett Central Business District, and dense residential and commercial areas; an alignment farther to the east would encounter major land use and environmental constraints, as well as Section 4(f) lands in Pecan Grove Park and Elgin B. Robertson Park. Therefore, there are no feasible and prudent alternatives to the use of the Coyle House Farmstead.

Alternative #EIS-1 includes all possible planning to minimize harm to the Coyle House Farmstead. The Federal Highway Administration (FHWA), Texas Department of Transportation (TxDOT), the State Historic Preservation Officer (SHPO), North Texas Tollway Authority (NTTA), and the City of Rowlett have executed a Mitigation Agreement that mitigates the adverse effects to the Coyle property resulting from the proposed undertaking by removing it from its present location to a new site in Pecan Grove Park. This Mitigation Agreement is included in Appendix G of the FEIS. Alternative #EIS-1 is a feasible and prudent alternative with the least harm on the Coyle House Farmstead after considering mitigation.

Based upon these considerations, there are no feasible and prudent alternatives to the use of land from the Coyle House Farmstead. The proposed action includes all possible planning to minimize harm to the Coyle House Farmstead that would result from such use. The Final Section 4(f) Evaluation was approved in conjunction with the FEIS that was approved on October 25, 2004.

D. Measures to Minimize Harm

Design and construction of Eastern Extension of the PGBT will include all practicable measures to minimize harm to the environment. The following are measures to minimize harm and are contained in Chapter 8.0- Preferred Alternative of the FEIS.

Noise barriers were determined to be both feasible and reasonable in four residential locations for Alternative #EIS-1. Any subsequent project design changes may require a reevaluation of this proposal. The final decision to construct the proposed noise barriers will be made upon completion of the project design and the public involvement process.

Project engineers will ensure that Federal Emergency Management Agency (FEMA) and local floodplain regulations are followed through the design and construction phases of the project. NTTA will cooperate with local floodplain administrators and local approvals will be obtained to ensure that no flood issues are created by the proposed project. Additionally, all necessary permits will be obtained prior to placement of fill/structures or excavation within floodplain areas. During final design, a detailed hydraulic analysis will be performed. Project engineers will submit the hydraulic data to FEMA for its review and acceptance.

It is estimated that Alternative #EIS-1 would impact 27 separate waters of the U.S. for a total of over 50 acres. Many of these impacts will be temporary, which means after construction the areas would be returned to pre-construction contours and re-vegetated. However, many of the impacts to waters of the U.S. would be permanent. All impacts to waters of the U.S. would be permitted through the US Army Corps of Engineers (USACE), which may require mitigation for some or all of the impacts. Mitigation for these impacts is typically at a 1:1 ratio if there is land available on-site and in-kind. The specific acreage, location, and type of waters of the US. mitigation will be developed during the Section 404 permitting process with the USACE. Coordination with the USACE has been initiated and will be completed when the specific type and amount of impacts to waters of the U.S. are known. The larger stream crossings will be spanned, both for floodplain hydraulics and to reduce impacts to waters of the U.S.

Two areas have been identified for on-site, in-kind mitigation. The final mitigation plan may utilize one of these two areas or a combination of the two areas. At the proposed site near Muddy Creek, mitigation would likely consist of restoration and enhancement of the streams and ponds, widening of the existing wooded areas along the riparian corridors, and enhancement of the adjacent upland areas with native vegetation plantings. At the proposed site near the IH 30 interchange, mitigation would involve the restoration and future preservation of an existing concrete-lined stream channel, which would be returned to a more natural state through removal of the concrete, channel modifications, adjacent grading, and planting of native vegetation.

Prior to initiation of final design, NTTA will have further discussions with Dallas Water Utilities on obtaining a construction easement across Lake Ray Hubbard, water quality, and lake safety. Additionally, further discussions will be conducted with Dallas Area Rapid Transit (DART) to resolve the policy issues of at-grade crossings of the DART-owned Union Pacific Railroad.

All filling and grading activities would comply with the Texas Pollution Discharge Elimination System General Permit Number TXR150000, under provisions of Section 402 of the Clean Water Act (CWA) and Chapter 26 of the Texas Water Code. Best Management Practices (BMPs) would be used to control sediments and suspended solids in stormwater discharges from roadway projects and right-of-ways. Existing vegetation will be preserved wherever possible. Both temporary and permanent erosion and sedimentation control measures would be

used. Disturbed areas would be restored and stabilized as required by the permit. An environmental soil and groundwater management plan will be developed during the design stage and included in the construction plans.

The project would comply with Section 401 water quality certification as required by the Texas Commission on Environmental Quality (TCEQ). A Tier II individual review would be required. The design and construction would include construction and post-construction BMPs to manage stormwater runoff and control sediments. Additionally, the project traverses Lake Ray Hubbard, which is within five miles upstream of a threatened or impaired water segment. Therefore, the project would be coordinated with TCEQ in accordance with a TxDOT-TCEQ Memorandum of Understanding for threatened or impaired stream segments designated under Section 303 (d) of the CWA.

Mitigation of impacts to waters of the U.S. along Alternative #EIS-1 will be addressed during the Section 404 permitting process. Accordingly, a great deal of the impacted wooded areas, which comprise a total of 53 acres, will also be mitigated through the Section 404 process. However, those wooded areas that are not mitigated through the Section 404 permit process will be mitigated consistent with NTTA and TxDOT policy, which typically calls for replacement at a 1:1 ratio. There will be room to replant over 100 acres of upland trees and shrubs within the project right-of-way near the proposed mainlane toll plaza and at the IH 30 interchange. These areas should afford adequate mitigation for those wooded areas that are not mitigated through the Section 404 process. Trees and shrubs to be planted will likely consist of bare-root seedlings, except where larger trees are desired for non-ecological reasons.

Coordination with USFWS and TPWD will continue to ensure that adequate measures are adopted to reduce or eliminate the potential for effects to listed species. While clearing from March through August cannot be excluded in entirety from potential construction schedules, any areas to be cleared between March and August would be surveyed by qualified biologists for signs of nesting activity in an effort to reduce the possibility of impacts to species covered under the Migratory Bird Treaty Act.

As previously mentioned, the Coyle House and its outbuildings will be relocated. A Mitigation Agreement has been executed to mitigate the adverse effects resulting from the proposed undertaking. Documentation in the form of photographs, written data, and a site plan will be prepared. The house will be properly moved to a publicly accessible site within Pecan Grove Park.

Archeological resources with potential for listing in the NRHP would be affected. As yet, no formal eligibility determinations have been made for these sites. Some of the archeological sites identified in the original reconnaissance were recommended for further investigation at a future date. TxDOT made a commitment with Texas Historical Commission (THC) to complete all archeological responsibilities required under Section 106 of the National Historic Preservation Act when access to the properties in the right-of-way is acquired. TxDOT has made a commitment with the THC to complete all archeological responsibilities under Section 106, when full access to the right-of-way is acquired.

The results of the database searches, historical aerial photograph review, and field survey of hazardous materials indicated there are two regulated material sites that could be impacted by right-of-way acquisition and/or construction of the project. However, given the level of detail of existing maps of the sites, it is not possible to discern which, if any, sites will be directly impacted at this time. These sites consist of landfills associated with municipal disposition of waste and leaking petroleum storage tanks associated with small petroleum fuel and oil facilities. The location(s) and type(s) of possible contamination connected with the landfills is unknown. As part of the right-of-way acquisition process, further testing will be conducted through a Phase II site assessment and if required, appropriate mitigation/monitoring and waste relocation plans will be implemented.

The visual analysis indicated that the project would introduce new visual elements within suburban and rural settings but the alignment has been depressed in several areas to help minimize visual impacts. All lighting sources would be indirect, diffused, or covered by shielded fixtures, and would be installed to reduce glare and the consequent interference with boundary streets and adjacent properties. However, visual impacts could occur at four areas- three residential areas and recreational users on Lake Ray Hubbard. Screening vegetation is proposed at the three residential areas. This mitigation could be part of the Section 404 mitigation for wooded areas. Because the proposed tollway would be on a bridge over Lake Ray Hubbard, visual screening is not possible; however, the design of the bridge as well as the landscaping would conform to NTTA's current *System-Wide Design Guidelines, or as amended*. Final mitigation treatments for visual impacts will be developed during final design through discussions with affected cities.

E. Monitoring or Enforcement

All commitments and conditions of approval stated in the FEIS (Chapter 8.0- Preferred Alternative) will be monitored by the NTTA, TxDOT, and other appropriate State, Federal, and local agencies to ensure compliance.

F. Comments on the FEIS

Comments from 11 individuals were received on the FEIS during the comment period. The comments were related to noise, visual impacts, specific property impacts, property value, access, secondary and cumulative effects, and agency review. Responses to comments are provided in Appendix A.

G. Conclusion

Based on the analysis and evaluation contained in the project's FEIS and Final Section 4(f) Evaluation and after careful consideration of all the social, economic, and environmental factors and input from the public involvement process, it is my decision to adopt Alternative #EIS-1 as the proposed action for the project.

Signed on January 24, 2005 by Salvador Deocampo, P.E., District Engineer, Texas Division, Federal Highway Administration

Appendix A : Table, Comments, and Response to Comments

Appendix A: Table, Comments, and Response to Comments

Comments on the FEIS

Comment *	Response Number
Question concerning landscaping or other sound abatement near Lake Ray Hubbard to IH 30. (1 commenter)	1
How the project will impact property located at 8906 Merritt Road in Rowlett, Texas. (1 commenter)	2
Would like to see more detailed plans showing the location of the proposed extension plans as they relate to my neighborhood. Concerned that the existence of this Turnpike Extension will decrease the value of home. (1 commenter)	3
The FEIS inadequately considers the secondary or cumulative impacts resulting from the expansion of local roadways (i.e., Kirby Road, Liberty Grove Road, Merritt Road and Miller Road, Chaha Road and Main Street), which the commenters believe would be required in order to accommodate increased traffic from the proposed PGBT. (2 commenters)	4
The U.S. Fish and Wildlife Service's Arlington Ecological Services (USFWS-ARLES) Field Office [Department of the Interior (DOI)] was never solicited by the NTTA to review and provide comments on the DEIS and FEIS. (2 commenters)	5
Concerned with accessibility to property and the vertical alignment of the main lanes and service roads, as it affects the ability to develop a site near Lake Ray Hubbard. (1 commenter)	6
Build at least a continuous 3,100-foot, 15-foot high wall the entire length of the Ridgecove subdivision from the Kirby Road right-of-way. (5 commenters)	7
Keep the tollway mainlanes and frontage roads at or below existing grade level for the entire length of the Ridgecove subdivision. (5 commenters)	8
Close off Meadowcove Drive with a continuous noise/visual barrier at its intersection with the southbound tollway service road, as agreed upon in the FEIS. (5 commenters)	9
Locate tollway signs away from the subdivision, when possible. (5 commenters)	10
Use only low or minimally required luminescent tollway lighting focused away from houses. (5 commenters)	11
Keep tollway light standards, signs, or other vertical elements as low as possible. (5 commenters)	12
Intersect Kirby Road with the southbound frontage road as planned, but also maintain Kirby Road as a through street to Miller Road. (5 commenters)	13

* Note: The comments that appear may not be the precise wording in order to reduce duplication of similar comments and responses.

Response to Comments on the Eastern Extension of PGBT FEIS

Comment 1: Question concerning landscaping or other sound abatement on the approach to the point where it crosses Lake Ray Hubbard in Rowlett and connects with IH 30.
Response 1: Sound abatement, in the form of noise walls, is proposed along the subdivisions north of Lake Ray Hubbard. As proposed these would end at the southern limits of the subdivisions and would not extend south to the lake shoreline. Because the proposed tollway would be on bridge over the lake, visual screening is not possible and no sensitive receivers would be directly adjacent to the bridge over the lake. The design of the bridge over Lake Ray Hubbard as well as the landscaping would substantially conform to NTTA *System-Wide Design Guidelines*, as amended.

Comment 2: Would like to know specifically how the project will impact property located at 8906 Merritt Road in Rowlett, Texas.
Response 2: Alternative #EIS-1 has been recommended as the preferred alternative. The property located at 8906 Merritt Road would not be displaced nor acquired for this alternative. The property would have been approximately 1,000 feet from alignment of Alternative #EIS-2 but is approximately 2,500 feet from Alternative #EIS-1.

Comment 3: I live at 2209 Harborview Boulevard in Rowlett, Texas. I have reviewed the general diagrams locating the two proposed extension plans and would like to see more detailed plans showing the location of the proposed extension plans as they relate to my neighborhood. I am concerned that the existence of this Turnpike Extension will decrease the value of my home.
Response 3: The preliminary design schematic is available for review at the NTTA offices located at 5900 West Plano Parkway, Plano, Texas 75093. Impacts of new roadway construction on residential property values are difficult to assess conclusively. The impact of new roadway construction is usually even more difficult to predict on any given property. Among other factors, continuing population growth, a strengthening of local economies within the project corridor, and relatively low interest rates have contributed to the demand for housing and steadily rising property valuations. These and other components of property value may have a greater influence on future valuations for residential properties within the project area than would the proposed roadway. There are several negative effects commonly associated with roadways (e.g. noise, pollution, dust, and decreased privacy) that, under certain circumstances, may decrease the value of property immediately adjacent to the roadway.

Noise impacts and mitigation measures were presented in the DEIS and FEIS in Section 4.6; Section 4.12 discusses visual and aesthetic impacts. As a result of the proposed project and other transportation improvements in the vicinity, the residential neighborhoods located along the corridor will be able to offer current and future residents the advantage of convenient access, adequate roadway capacity, and easy access to major commuting and travel routes. It is possible the value of these properties may appreciate more with the construction and operation of the roadway than under the No-Build Alternative. Overall, the proposed improvements are expected to have a beneficial effect on the area's economy and employment.

Comment 4: The FEIS inadequately considers the secondary or cumulative impacts resulting from the expansion of local roadways (i.e., Kirby Road, Liberty Grove Road, Merritt Road and Miller Road, Chaha Road and Main Street), which the commenters believe would be required in order to accommodate increased traffic from the proposed PGBT.
Response 4: Regional and subarea travel demand computer modeling conducted by the North Central Texas Council of Governments, using the official Dallas-Fort Worth Regional Travel Model, provided the analytical basis for assessing the effect of the PGBT on local and regional roadways. Cumulative impacts on the transportation system are discussed on page 4-63 of the FEIS where it is noted that traffic congestion would continue to decline within the study corridor without the PGBT. The FEIS documents this point in Section 1.4.2 Transportation Demand by reporting that many of the local area roadways were already congested in 1995. Based on the

travel demand computer modeling performed for the DEIS and FEIS, the analysis indicated that because of the projected growth in both employment and population in the study area and region, local and regional traffic congestion would continue to worsen if no major transportation facilities are built. Figure 1.6 1995 Level-of Service and Figure 1.7 2025 Baseline Level-of Service on FEIS pages 1-16 and 1-17 show the increased levels of congestion on local area roadways (i.e., Kirby Road, Liberty Grove Road, Miller Road, Main Street) if the proposed PGBT is not built. Table 4.9 Regional and Study Area LOS on FEIS page 4-19 shows that the percentage of both the study area and regional roadway network operating at congested levels-of-service would decline slightly under the Build Alternatives. In other words, the Build Alternatives would help reduce traffic congestion levels on local and regional roadways.

Comment 5: The U.S. Fish and Wildlife Service's Arlington Ecological Services (USFWS-ARLES) Field Office [Department of the Interior (DOI)] was never solicited by the NTTA to review and provide comments on the DEIS and FEIS.
Response 5: Copies of the DEIS and FEIS were provided to both the Regional Director of the USFWS and to the Secretary of the Interior. Contact with the USFWS-ARLES in January 2005 confirmed the office received both the DEIS and FEIS from the Regional Office of USFWS.

Project-related correspondence from the USFWS-ARLES office in Arlington solicited by and addressed to project representatives is included in Appendix F of the FEIS on pages F-33 through F-39. Comments on the DEIS were received from the DOI Office of Environmental Policy and Compliance during the DEIS circulation period. These comments (Comments 6 through 14) were addressed in Chapter 7 of the FEIS. Additionally, correspondence (FEIS page F-71) from the DOI (Office of the Secretary, Office of Environmental Policy and Compliance), acknowledges the agency's review of the Draft FEIS.

Comment 6: Concerned with accessibility to my property and the vertical alignment of the main lanes and service roads, as it affects the ability to develop a site near Lake Ray Hubbard. The property requires service access roads and on/off ramps on the east and west side which are connected either by a U-turn or an underpass for adequate access.
Response 6: To facilitate access to the proposed entertainment district, the preliminary design includes one-way frontage roads from Miller Road to just north of the shoreline of Lake Ray Hubbard along with an entrance and exit ramp to serve both Miller Road and the proposed Entertainment District designated by the City of Rowlett. Driveway access to/from the frontage roads will be allowed, if at all, within design standards to ensure public safety.

Comment 7: Build at least a continuous 3,100-foot, 15-foot high wall the entire length of the Ridgecove subdivision from the Kirby Road right-of-way to beyond the southernmost house that abuts the tollway right-of-way.
Response 7: South of Miller Road, a 10-foot high noise wall has been recommended on the west side of the roadway from south of Kirby Road to the southern end of the subdivision. The NTTA conducts studies prior to the installation of noise walls. The height, location, and other specifications of the wall are based on many other factors, the results of computer modeling, and the requirements concerning noise levels. Prior to beginning construction, the length and height for each noise wall will be reviewed based on the more detailed design. Feasibility for each noise wall is determined by effectiveness, costs, and other criteria established by regulations and guidelines. Additionally, the final decision to construct the proposed noise walls would be made upon completion of the project design and the public involvement process with the affected property owners who would be directly adjacent to the proposed noise walls.

Comment 8: Keep the tollway mainlanes and frontage roads at or below existing grade level for the entire length of the Ridgecove subdivision.
Response 8: As proposed in the preliminary design schematic, the frontage roads for the project would be predominately at natural ground level. At stream crossings the roadway may be above natural ground level in order to maintain water flow and prevent flooding of the roadway. The mainlanes would be slightly higher than the frontage roads for drainage reasons

but would be as close to natural ground as practicable. During the public meetings, many people requested the alignment be depressed to minimize visual and community effects. The study team evaluated these requests. Among the concerns associated with depressing a roadway include providing access from the main roadway to the frontage roads, higher construction and maintenance costs, and the ability to drain water out of the depressed section of roadway.

The final decision as to which areas would be depressed was made jointly by NTTA and each city based on a variety of factors including public input, feasibility, the cost added to the project, the ability to fund the project, and local funding participation. The cost of depressing the roadway could significantly increase the cost of the project and jeopardize its feasibility. Typically, the cost for depressing a roadway is 25 to 30 percent higher than building it at ground level. These costs would be borne by the community making the request.

Comment 9: Close off Meadowcove Drive with a continuous noise/visual barrier at its intersection with the southbound tollway service road, as agreed upon in the FEIS per the Comment/Response 46 shown on page 7-27.
Response 9: As discussed in the FEIS, the preliminary design schematic does not show Meadowcove Drive tying into the frontage road to allow for the noise wall to be continuous.

Comment 10: Locate tollway signs away from the subdivision, when possible.
Response 10: Comment noted and considered; however, signage must be placed according to design and safety standards. To help minimize visual impacts caused by the tollway, the NTTA has developed design guidelines to provide consistency throughout the system. The NTTA *System-Wide Design Guidelines*, as amended, will provide guidance for landscaping, toll plaza, signage, and structures.

Comment 11: Use only low or minimally required luminescent tollway lighting focused away from houses.
Response 11: All lighting sources would be indirect, diffused, or covered by shielded fixtures, and would be installed in an effort to reduce glare and the consequent interference with boundary streets and adjacent properties.

Comment 12: Keep tollway light standards, signs, or other vertical elements as low as possible.
Response 12: To help minimize visual impacts caused by the tollway, the NTTA has developed design guidelines to provide consistency throughout the system. The NTTA *System-Wide Design Guidelines*, as amended, will provide guidance for landscaping, toll plaza, signage, and structures.

Comment 13: Intersect Kirby Road with the southbound frontage road as planned, but also maintain Kirby Road as a through-street to Miller Road. This could be done by diverting Kirby Road north to Miller Road just prior to the Kirby Road intersection with the tollway (west of the tollway) or creating a newly named street that runs north to Miller Road (west of the tollway). This "newly" constructed road would run north along and west of the tollway right-of-way, but east of the D.R. Horton facility and dead-end into Miller Road allowing only a right turn, if need be.
Response 13: Local governments were consulted during the development of the alternatives with regard to local roadways and access. Based on this coordination, one-way frontage roads are proposed to maintain existing access to the neighborhoods as well as provide access to the proposed entertainment district. Roadways beyond the proposed right-of-way of the tollway would be the responsibility of the city.

TRD-200500421
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: January 31, 2005

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Texas Water Development Board

Applications Received

Pursuant to the Texas Water Code, Section 6.195, the Texas Water Development Board provides notice of the following applications received by the Board:

City of Alpine, 100 North 13th Street, Alpine, Texas, 79830, received December 29, 2004, application for financial assistance in the amount of $4,860,000 from the Drinking Water State Revolving Fund-Disadvantaged Community Program.

City of Alvord, P. O. Box 63, Alvord, Texas, 76225-0063, received December 17, 2004, application for financial assistance in the amount of $360,000 from the Drinking Water State Revolving Fund.

City of Aransas Pass, 600 West Cleveland, P.O. Box 2000, Aransas Pass, Texas, 78335-2000, received January 21, 2005, application for financial assistance in the amount of $1,115,000 from the Clean Water State Revolving Fund.

City of Clarksville, P.O. Box 1209, Gladewater, Texas, 75647-1209, received September 21, 2004, application for financial assistance in the amount of $1,530,000 from the Texas Water Development Funds.

City of Bovina, 205 North Street, Bovina, Texas, 79009, received November 16, 2004, application for financial assistance in the amount of $1,750,000 from the Texas Water Development Funds.

Lumberton Municipal Utility District, P. O. Box 8065, 55 West Chance, Lumberton, Texas, 77657, received December 31, 2004, application for financial assistance in the amount of $8,765,000 from the Clean Water State Revolving Fund.

City of Manvel, P.O. Box 187, 6615 FM 1128, Manvel, Texas, 77578, received February 17, 2004, application for financial assistance in the amount of $2,000,000 from the Texas Water Development Funds.

Lower Colorado River Authority, P.O. Box 220 Austin, Texas, 78767-0220, received November 18, 2004, application for financial assistance in an amount not to exceed $30,000 from the Research and Planning Fund.

Colorado River Municipal Water District, 400 East 24th Street, Big Spring, Texas, 79721-0869, received November 18, 2004, application for financial assistance in an amount not to exceed $150,000 from the Research and Planning Fund.

City of Fort Worth, P.O. Box 870, Fort Worth, Texas, 76101-0870, received November 18, 2004, application for financial assistance in an amount not to exceed $213,611 from the Research and Planning Fund.

Chisholm Trail Special Utility District, P.O. Box 249, Florence, Texas, 76527, received November 18, 2004, application for financial assistance in an amount not to exceed $62,000 from the Research and Planning Fund.

TRD-200500484
Jonathan Steinberg
Deputy Counsel
Texas Water Development Board
Filed: February 2, 2005

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Texas Workers' Compensation Commission

Invitation to Apply to the Medical Advisory Committee (MAC)

The Texas Workers' Compensation Commission seeks to have a diverse representation on the MAC and invites qualified individuals from all regions of Texas to apply for openings on the MAC in accordance with the eligibility requirements of the *Procedures and Standards for the Medical Advisory Committee*. The Medical Review Division is currently accepting applications for the following Medical Advisory Committee representative vacancies:

Primary

* Public Health Care Facility

Alternate

* Public Health Care Facility

* Dentist

* Pharmacist

* Podiatrist

* Employer

* Employee

* General Public Representative 1

* General Public Representative 2

Commissioners for the Texas Workers' Compensation Commission appoint the Medical Advisory Committee members who are composed of 18 primary and 18 alternate members representing health care providers, employees, employers, insurance carriers, and the general public. Primary members are required to attend all Medical Advisory Committee meetings, subcommittee meetings, and work group meetings to which they are appointed. The alternate member may attend all meetings, however during a primary member's absence, the alternate member must attend meetings to which the primary member is appointed. Requirements and responsibilities of members are established in the Procedures and Standards for the Medical Advisory Committee as adopted by the Commission.

The Medical Advisory Committee meetings must be held at least quarterly each fiscal year during regular Commission working hours. Members are not reimbursed for travel, per diem, or other expenses associated with Committee activities and meetings. Voluntary service on the Medical Advisory Committee is greatly appreciated by the TWCC Commissioners and the TWCC Staff.

The purpose and task of the Medical Advisory Committee, which includes advising the Commission's Medical Review Division on the development and administration of medical policies, rules and guidelines, are outlined in the Texas Workers' Compensation Act, §413.005.

Applications and other relevant Medical Advisory Committee information may be viewed and downloaded from the Commission's website at *http://www/twcc.state.tx.us.* Click on 'Commission Meetings', then 'Medical Advisory Committee'. Applications may also be obtained by calling Jane McChesney, MAC Coordinator, at 512-804-4855 or Ruth Richardson, Manager of Monitoring, Analysis and Education, Medical Review Division at 512-804-4850 .

The qualifications as well as the terms of appointment for all positions are listed in the Procedures and Standards for the Medical Advisory Committee. These Procedures and Standards are as follows:

LEGAL AUTHORITY The Medical Advisory Committee for the Texas Workers' Compensation Commission, Medical Review Division is established under the Texas Workers' Compensation Act, (the Act) §413.005.

PURPOSE AND ROLE The purpose of the Medical Advisory Committee (MAC) is to bring together representatives of health care specialties and representatives of labor, business, insurance and the general public to advise the Medical Review Division in developing and administering the medical policies, fee guidelines, and the utilization guidelines established under §413.011 of the Act.

COMPOSITION Membership. The composition of the committee is governed by the Act, as it may be amended. Members of the committee are appointed by the Commissioners and must be knowledgeable and qualified regarding work-related injuries and diseases.

Members of the committee shall represent specific health care provider groups and other groups or interests as required by the Act, as it may be amended. As of September 1, 2001, these members include a public health care facility, a private health care facility, a doctor of medicine, a doctor of osteopathic medicine, a chiropractor, a dentist, a physical therapist, a podiatrist, an occupational therapist, a medical equipment supplier, a registered nurse, and an acupuncturist. Appointees must have at least six (6) years of professional experience in the medical profession they are representing and engage in an active practice in their field.

The Commissioners shall also appoint the other members of the committee as required by the Act, as it may be amended. An insurance carrier representative may be employed by: an insurance company; a certified self-insurer for workers' compensation insurance; or a governmental entity that self-insures, either individually or collectively. An insurance carrier member may be a medical director for the carrier but may not be a utilization review agent or a third party administrator for the carrier.

A health care provider member, or a business the member is associated with, may not derive more than 40% of its revenues from workers compensation patients. This fact must be certified in their application to the MAC.

The representative of employers, representative of employees, and representatives of the general public shall not hold a license in the health care field and may not derive their income directly from the provision of health care services.

The Commissioners may appoint one alternate representative for each primary member appointed to the MAC, each of whom shall meet the qualifications of an appointed member.

Terms of Appointment: Members serve at the pleasure of the Commissioners, and individuals are required to submit the appropriate application form and documents for the position. The term of appointment for any primary or alternate member will be two years, except for unusual circumstances (such as a resignation, abandonment or removal from the position prior to the termination date) or unless otherwise directed by the Commissioners. A member may serve a maximum of two terms as a primary, alternate or a combination of primary and alternate member. Terms of appointment will terminate August 31 of the second year following appointment to the position, except for those positions that were initially created with a three-year term. For those members who are appointed to serve a part of a term that lasts six (6) months or less, this partial appointment will not count as a full term.

Abandonment will be deemed to occur if any primary member is absent from more than two (2) consecutive meetings without an excuse accepted by the Medical Review Division Director. Abandonment will be deemed to occur if any alternate member is absent from more than two (2) consecutive meetings which the alternate is required to attend because of the primary member's absence without an excuse accepted by the Medical Review Division Director.

The Commission will stagger the August 31st end dates of the terms of appointment between odd and even numbered years to provide sufficient continuity on the MAC.

In the case of a vacancy, the Commissioners will appoint an individual who meets the qualifications for the position to fill the vacancy. The Commissioners may re-appoint the same individual to fill either a primary or alternate position as long as the term limit is not exceeded. Due to the absence of other qualified, acceptable candidates, the Commissioners may grant an exception to its membership criteria, which are not required by statute.

RESPONSIBILITY OF MAC MEMBERS Primary Members. Make recommendations on medical issues as required by the Medical Review Division.

Attend the MAC meetings, subcommittee meetings, and work group meetings to which they are appointed.

Ensure attendance by the alternate member at meetings when the primary member cannot attend.

Provide other assistance requested by the Medical Review Division in the development of guidelines and medical policies.

Alternate Members. Attend the MAC meetings, subcommittee meetings, and work group meetings to which the primary member is appointed during the primary member's absence.

Maintain knowledge of MAC proceedings.

Make recommendations on medical issues as requested by the Medical Review Division when the primary member is absent at a MAC meeting.

Provide other assistance requested by the Medical Review Division in the development of guidelines and medical policies when the primary member is absent from a MAC meeting.

Committee Officers. The TWCC Commissioners designate the chairman of the MAC. The MAC will elect a vice chairman. A member shall be nominated and elected as vice chairman when he/she receives a majority of the votes from the membership in attendance at a meeting at which nine (9) or more primary or alternate members are present.

Responsibilities of the Chairman: Preside at MAC meetings and ensure the orderly and efficient consideration of matters requested by the Medical Review Division; prior to meetings, confer with the Medical Review Division Director, and when appropriate, the TWCC Executive Director to receive information and coordinate:

a. Preparation of a suitable agenda.

b. Planning MAC activities.

c. Establishing meeting dates and calling meetings.

d. Establishing subcommittees.

e. Recommending MAC members to serve on subcommittees.

If requested by the Commission, appear before the Commissioners to report on MAC meetings.

COMMITTEE SUPPORT STAFF The Director of Medical Review will provide coordination and reasonable support for all MAC activities. In addition, the Director will serve as a liaison between the MAC and the Medical Review Division staff of TWCC, and other Commission staff if necessary.

The Medical Review Director will coordinate and provide direction for the following activities of the MAC and its subcommittees and work groups:

Preparing agenda and support materials for each meeting.

Preparing and distributing information and materials for MAC use.

Maintaining MAC records.

Preparing minutes of meetings.

Arranging meetings and meeting sites.

Maintaining tracking reports of actions taken and issues addressed by the MAC.

Maintaining attendance records.

SUBCOMMITTEES The chairman shall appoint the members of a subcommittee from the membership of the MAC. If other expertise is needed to support subcommittees, the Commissioners or the Director of Medical Review may appoint appropriate individuals.

WORK GROUPS When deemed necessary by the Director of Medical Review or the Commissioners, work groups will be formed by the Director. At least one member of the work group must also be a member of the MAC.

WORK PRODUCT No member of the MAC, a subcommittee, or a work group may claim or is entitled to an intellectual property right in work performed by the MAC, a subcommittee, or a work group.

MEETINGS Frequency of Meetings. Regular meetings of the MAC shall be held at least quarterly each fiscal year during regular Commission working hours.

CONDUCT AS A MAC MEMBER Special trust has been placed in members of the Medical Advisory Committee. Members act and serve on behalf of the disciplines and segments of the community they represent and provide valuable advice to the Medical Review Division and the Commission. Members, including alternate members, shall observe the following conduct code and will be required to sign a statement attesting to that intent.

Comportment Requirements for MAC Members:

Learn their duties and perform them in a responsible manner;

Conduct themselves at all times in a manner that promotes cooperation and effective discussion of issues among MAC members;

Accurately represent their affiliations and notify the MAC chairman and Medical Review Director of changes in their affiliation status;

Not use their memberships on the MAC: a. in advertising to promote themselves or their business. b. to gain financial advantage either for themselves or for those they represent; however, members may list MAC membership in their resumes;

Provide accurate information to the Medical Review Division and the Commission;

Consider the goals and standards of the workers' compensation system as a whole in advising the Commission;

Explain, in concise and understandable terms, their positions and/or recommendations together with any supporting facts and the sources of those facts;

Strive to attend all meetings and provide as much advance notice to the Texas Workers' Compensation Commission staff, attn: Medical Review Director, as soon as possible if they will not be able to attend a meeting; and

Conduct themselves in accordance with the MAC Procedures and Standards, the standards of conduct required by their profession, and the guidance provided by the Commissioners, Medical Review Division or other TWCC staff.

TRD-200500458
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Filed: February 1, 2005

How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 29 (2004) is cited as follows: 29 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "29 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 29 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For subscription information, see the back cover or call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC)*** is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles (using Arabic numerals) and Parts (using Roman numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15:

1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 16, April 9, July 9, and October 8, 2004). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).

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